IN THE

Supreme Court of the United States

October Term, 1972

FILED
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MICHAEL RODAK, JR., CLERK

No. 72-549

THE SCHOOL BOARD OF THE CITY OF RICHMOND, VIRGINIA, *et al.*,

Petitioners,

v.

THE STATE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA, *et al.*

No. 72-550

CAROLYN BRADLEY, *et al.*,

Petitioners,

v.

THE STATE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA, *et al.*

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

GEORGE B. LITTLE
JAMES K. CLUVERIUS
Browder, Russell, Little & Morris
1510 Ross Building
Richmond, Virginia 23219

LEONARD B. MATTOX, JR.
City Attorney
1001 East Broad Street
Richmond, Virginia 23219

Attorneys for Petitioners
The School Board of the
City of Richmond, et al.

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
10 Columbus Circle
New York, New York 10019

LOUIS R. LUCAS
525 Commerce Title Bldg.
Memphis, Tennessee 38103

WILLIAM L. TAYLOR
Catholic University Law School
Washington, D.C.

JAMES R. OLPHIN
214 East Clay Street
Richmond, Virginia 23219

M. RALPH PAGE
420 North First Street
Richmond, Virginia 23219

ANTHONY G. AMSTERDAM
Stanford University Law School
Stanford, California 94305

Attorneys for Petitioners
Carolyn Bradley, et al.

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Counsel for petitioners in each of these cases, presently pending upon petitions for writs of certiorari, file this joint supplemental brief pursuant to Rule 24(5) of this Court. A significant decision of another United States Court of Appeals has been rendered since the filing of the

petitions for writs of certiorari, which conflicts with the decision of which review is sought by the petitioners, and which underscores the importance and desirability of granting review.

On December 8, 1972, the United States Court of Appeals for the Sixth Circuit rendered a decision in *Bradley* v. *Milliken*, Nos. 72-1809, -1814, which affirmed the district court's decision to require a plan of desegregation for Detroit not limited by school district boundary lines, and upheld the power of the court to fashion such a remedy. (The district court decision is referred to in note 36 at page 53 of the Petition in No. 72-549 and in note 122, page 64 of the Petition in No. 72-550.) The Court of Appeals' opinion in the Detroit case, *Bradley* v. *Milliken*, is directly contrary to the decision below of which review is sought. (See the Sixth Circuit's comment at page 67 of the opinion, declining to follow the Fourth Circuit.)

The decision of the Court of Appeals for the Sixth Circuit is appended hereto.

Respectfully submitted,

RGE B. LITTLE
ES K. CLUVERIUS
rowder, Russell, Little
& Morris
10 Ross Building
ichmond, Virginia 23219

ARD B. MATTOX, JR.
ty Attorney
01 East Broad Street
ichmond, Virginia 23219

rneys for Petitioners
School Board of the
of Richmond, et al.

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
10 Columbus Circle
New York, New York 10019

LOUIS R. LUCAS
525 Commerce Title Bldg.
Memphis, Tennessee 38103

WILLIAM L. TAYLOR
Catholic University Law School
Washington, D.C.

JAMES R. OLPHIN
214 East Clay Street
Richmond, Virginia 23219

M. RALPH PAGE
420 North First Street
Richmond, Virginia 23219

ANTHONY G. AMSTERDAM
Stanford University Law School
Stanford, California 94305

Attorneys for Petitioners
Carolyn Bradley, et al.

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APPENDIX

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Nos. 72-1809 – 72-1814

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RONALD BRADLEY, ET AL.,
Plaintiffs-Appellees,

v.

WILLIAM G. MILLIKEN, Governor of Michigan, etc.; BOARD OF EDUCATION OF THE CITY OF DETROIT,
Defendants-Appellants,

and

DETROIT FEDERATION OF TEACHERS LOCAL 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,
Defendant-Intervenor-Appellee,

and

ALLEN PARK PUBLIC SCHOOLS, ET AL.,
Defendants-Intervenors-Appellants,

and

KERRY GREEN, ET AL.,
Defendants-Intervenors-Appellees.

APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed December 8 1972.

Before PHILLIPS, Chief Judge, EDWARDS and PECK, Circuit Judges.

PHILLIPS, Chief Judge. This is a school desegregation case involving the metropolitan area of Detroit, Michigan.

The present appeal is the fourth time that the case has been before this court since the complaint was filed August 18,

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1970. The earlier decisions of this court are reported at *Bradley* v. *Milliken*, 433 F.2d 897 (1970); *Bradley* v. *Milliken*, 438 F.2d 897 (1971); and *Bradley* v. *Milliken*, — F.2d — (1972), *cert. denied*, — U.S. —, 41 U.S.L.W. 3175 (Oct. 10, 1972). (On November 27, 1972 this Court dismissed for want of jurisdiction an "emergency motion" by the Detroit Board of Education that State officials be required to provide funds to keep the Detroit public schools operating for 180 regular days of instruction during the current school year. — F. 2d —.)

No specific desegregation plan has been ordered by the District Court. The procedural history of the litigation is set forth below.

Before this court at the present time are four interlocutory orders from which we have granted appeal pursuant to 28 U.S.C. § 1292(b) and one final order, viz:

1. Ruling on Issue of Segregation, dated September 27, 1971, reported at 338 F.Supp. 582;

2. Findings of fact and conclusions of law on "Detroit only" plans of desegregation, dated March 28, 1972;

3. Ruling on Propriety of a Metropolitan Remedy to Accomplish Desegregation of the Public Schools of the City of Detroit, dated March 24, 1972;

4. Ruling on Desegregation Area and Development of Plan, and Findings of Fact and Conclusions of Law in support thereof, dated June 14, 1972; and

5. Order dated July 11, 1972, directing Michigan State officials to purchase 295 school buses (which this court considers to be a final order).

On July 13, 1972, following oral argument, this court granted a motion for a temporary stay of the District Court's order of July 11, 1972, ordering the purchase of 295 school buses.

On July 17, 1972, following oral argument, this court directed that its stay order remain in effect until entry by the District Court of a final desegregation order or until certification by the

District Court of an appealable question as provided by 28 U.S.C. § 1292(b).

Thereafter the District Court certified that the orders set forth above involve controlling questions of law, as provided by 28 U.S.C. § 1292(b), and made a determination of finality under Rule 54(b), Fed. R. Civ. P.

On July 20, 1972, this court entered an order granting the interlocutory appeal concluding that:

> "[A]mong the substantial questions presented there is at least one difficult issue of first impression that never has been decided by this court or the Supreme Court. In so holding we imply nothing as to our view of the merits of this appeal. We conclude that an immediate appeal may materially advance the ultimate termination of the litigation."

The motion for leave to appeal was granted and the case was advanced for oral arguments on the merits on August 24, 1972.

The July 20, 1972, order of this court included the following stay order, which has remained in effect pending final disposition of the appeal on its merits:

> "The motion for stay pending appeal having been considered, it is further ORDERED that the Order for Acquisition of Transportation, entered by the District Court on July 11, 1972, and all orders of the District Court concerned with pupil and faculty reassignment within the Metropolitan Area beyond the geographical jurisdiction of the Detroit Board of Education, and all other proceedings in the District Court other than planning proceedings, be stayed pending the hearing of this appeal on its merits and the disposition of the appeal by this court, or until further order of this court. This stay order does not apply to the studies and planning of the panel which has been appointed by the District Court in its order of June 14, 1972, which panel was charged with the duty of preparing interim and final plans of desegregation. Said

> panel is authorized to proceed with its studies' and planning during the disposition of this appeal, to the end that there will be no unnecessary delay in the implementation of the ultimate steps contemplated in the orders of the District Court in event the decision of the District Court is affirmed on appeal. Pending disposition of the appeal, the defendants and the School Districts involved shall supply administrative and staff assistance to the aforesaid panel upon its request. Until further order of this court, the reasonable costs incurred by the panel shall be paid as provided by the District Court's order of June 14, 1972."

This court also has granted leave to appeal to various intervening parties and leave to file numerous amicus briefs. Extensive oral arguments on the merits were heard August 24, 1972. The briefs and arguments of all the parties have been considered in the disposition of this appeal.

We affirm two of the rulings of the District Court summarized above: (1) The Ruling on the Issue of Segregation and (2) the Findings of Fact and Conclusions of Law on "Detroit-only" plans of desegregation. We hold that the findings of fact of the District Court as set forth in these rulings are not clearly erroneous, Rule 52(a), Fed. R. Civ. P., but to the contrary are supported by substantial evidence.

As to the District Court's third ruling pertaining to the propriety of a Metropolitan remedy, we affirm in part and reverse in part. We vacate this and the two remaining orders and remand to the District Court for further proceedings as hereinafter set forth in detail in this opinion.

I. Chronology of Proceedings

On April 7, 1970, the Detroit Board of Education adopted a plan to effect a more balanced distribution of black and white students in the senior high schools through enactment of changes in attendance zones involving some 12,000 pupils, to become effective over a three year period. Three months later this modest effort was thwarted by the legislature of

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the State of Michigan through enactment of Act 48 of the Public Acts of 1970. Section 12 of the Act delayed implementation of the plan. The four members of the Board who supported the April 7 plan were removed from office through a citizen initiated recall election. The new members of the board and the incumbent members who had originally opposed the April 7 plan thereafter rescinded it.

The complaint in this case was filed by individual black and white school children and their parents, and the Detroit branch of the NAACP against the Board of Education of the City of Detroit, its members, and the then Superintendent of Schools, as well as the Governor, the Attorney General, the State Board of Education and the State Superintendent of Public Instruction of the State of Michigan.

The complaint alleged that the Detroit public school system was and is segregated on the basis of race as the result of actions and policies of the Board of Education and of the State of Michigan. The complaint specifically challenged the constitutionality of Act 48 of the Public Acts of 1970 of the State of Michigan, which in effect repealed the April 7, 1970, high school desegregation plan formulated by the Detroit Board.

The case was heard originally on plaintiffs' motion for a preliminary injunction to restrain the enforcement of Act 48. In response to this motion the District Judge denied a preliminary injunction, did not rule on the constitutionality of Act 48, but granted the motion of the Governor and Attorney General of Michigan for dismissal of the cause as to them. On appeal this court held that § 12 of Act 48 was an unconstitutional interference with the lawful protection of Fourteenth Amendment rights, that there was no abuse of discretion in denying a preliminary injunction, and that the Governor and Attorney General should not have been dismissed as parties defendant at that stage of the proceeding. The case was remanded to the District Court for an expedited trial on the merits. 433 F.2d 897.

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On remand plaintiffs moved for immediate implementation of the April 7 plan. On December 3, 1970, following an evidentiary hearing on that plan and two updated plans, the District Court ordered implementation of the "Magnet" or "McDonald" plan effective at the beginning of the next full school year, pending ultimate disposition on the merits. Plaintiffs appealed and filed a motion for summary reversal. This court again held that the District Court had not abused its discretion in refusing to adopt the April 7 plan prior to an evidentiary hearing on the allegations of constitutional violations in the complaint. We remanded the case with instructions to proceed to trial expeditiously on the merits of plaintiffs' allegations concerning the Detroit public school system. 438 F.2d 945. The trial of the case on the issue of segregation began April 6, 1971, and continued until July 22, 1971, consuming 41 trial days. On September 27, 1971, the District Court issued its ruling on the issue of segregation, holding that the Detroit public school system was racially segregated as a result of unconstitutional practices on the part of the defendant Detroit Board of Education and the Michigan State defendants. 338 F.Supp. 582.

A decision on a motion to join a large number of suburban school districts as parties defendant was deferred on the ground that the motion was premature, in that no reasonably specific desegregation plan was before the court. The Detroit Board of Education was ordered to submit desegregation plans limited to the City, while State defendants were directed to submit plans encompassing the three-county metropolitan area. An effort was made to appeal these orders to this court. On February 23, 1972, this court held the orders to be non-appealable and dismissed the appeal. — F.2d —, *cert. denied*, — U.S. —, 41 U.S.L.W. 3175 (Oct. 10, 1972).

After further proceedings concerning proposals for a Detroit only desegregation remedy and the presentation of two plans therefor, the District Judge on March 24, 1972, issued a ruling entitled "Ruling on Propriety of Considering a Metro-

politan Remedy," and on March 28, 1972, he issued "Findings of Fact and Conclusions of Law on Detroit Only Plans of Desegregation." He rejected all Detroit only plans, saying in part: "Relief of segregation in the public schools of the City of Detroit cannot be accomplished within the corporate geographical limits of the city."

Subsequently, the District Court issued an order on June 14, 1972, entitled "Ruling on Desegregation Area and Order for Development of Plan for Desegregation." In this ruling and order the District Court established tentative boundaries for a metropolitan remedy and provided for a panel of nine members to design plans for integration of the Detroit schools and those of 53 metropolitan school districts within certain guidelines.

The panel recommended preparatory purchases of school buses prior to implementation of an interim plan in September 1972. Following a hearing, the District Court on July 11 ordered State defendants to purchase or otherwise acquire 295 school buses.

In view of the intervening Congressional action by the enactment of the "Broomfield Amendment," certification was made to the Attorney General of the United States that the constitutionality of § 803 of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235, had been called into question. The Department of Justice intervened, filed a brief and participated in the oral arguments before this court.

II. The Issues

All of the parties to this litigation in one form or another present three basic issues which we phrase as follows:

1. Are the District Court's findings of fact pertaining to constitutional violations resulting in system-wide racial segregation of the Detroit Public Schools supported by substantial evidence or are they clearly erroneous?

2. Based on the record in this case, can a constitutionally

adequate system of desegregated schools be established within the geographic limits of the Detroit school district?

3. On this record does the District Judge's order requiring preparation of a metropolitan plan for cross-district assignment and transportation of school children throughout the Detroit metropolitan area represent a proper exercise of the equity power of the District Court?

III. The Constitutional Violations

(A) Constitutional violations found to have been committed by the Detroit Board of Education:

(1) Segregative zoning and assignment practices.

(a) The District Judge found that the Detroit Board of Education formulated and modified attendance zones to create or perpetuate racial segregation. He also found that the feeder system for junior and senior high schools was designed to maintain rather than eliminate black or white schools at the higher levels. Its practice of shaping school attendance zones on a north-south rather than an east-west orientation resulted in attendance zone boundaries conforming to racial dividing lines.

(b) He further found that the Detroit Board of Education's policies involved a substantial number of instances of transporting black children past white schools with available school space.

(2) He also found that it was the policy of the Board of Education to create optional attendance areas which permitted white students to transfer to all white or predominately white schools located nearer the city limits.

(3) The District Judge also found that the policies of the Detroit Board of Education (and State Board of Education) concerning school construction in some instances had the purpose of segregating students on a racial basis and in many others resulted in maintaining or increasing segregation.

(1) Segregative Zoning and Assignment Practices.

(a) The District Judge's findings of fact pertaining to alteration of zones and feeder patterns are as follows:

"The Board has created and altered attendance zones, maintained and altered grade structures and created and altered feeder school patterns in a manner which has had the natural, probable and actual effect of continuing black and white pupils in racially segregated schools. The Board admits at least one instance where it purposefully and intentionally built and maintained a school and its attendance zone to contain black students. Throughout the last decade (and presently) school attendance zones of opposite racial compositions have been separated by north-south boundary lines, despite the Board's awareness (since at least 1962) that drawing boundary lines in an east-west direction would result in significant integration. The natural and actual effect of these acts and failures to act has been the creation and perpetuation of school segregation. There has never been a feeder pattern or zoning change which placed a predominantly white residential area into a predominantly black school zone or feeder pattern. Every school which was 90% or more black in 1960, and which is still in use today, remains 90% or more black." 338 F.Supp. at 588.

The legal conclusion of the District Judge is as follows:

"5. The Board's practice of shaping school attendance zones on a north-south rather than an east-west orientation, with the result that zone boundaries conformed to racial residential dividing lines, violated the Fourteenth

'Their first disillusionment occurred only a few months, but yet a few weeks after the passage of the millage – they were rewarded with the creation of the present Center District. In effect this District, with a few minor exceptions, created a segregated school system. It accomplished with a few marks of the crayon on the map, the return of the Negro child from the few instances of an integrated school exposure, to the traditional predominantly uniracial school system to which he had formerly been accustomed in the City of Detroit.

'Their attempts to meet this threat to their children's educational experience through existing school organizations met with little success. Their conferences with District and City-Wide administrators including the superintendent, Dr. Samuel Brownell, resulted in only rationalizations concerning segregated housing patterns, and denials of any attempts at segregation. When it was pointed out that regardless of motivation, that segregation was the result of their boundary changes, little compromise was effected, except in one or two instances, where opposition leadership was most vocal and aggressive.

'Concurrent with boundary changes, it was alarmingly noticeable that the school population within the Center District was rapidly increasing, and that the priority building program would have little positive effect in dealing with the problem. Attempts to discuss this problem with school and district administration gave promise of only minimal relief.

'Finally, it had been earlier noted by new residents moving into what is now the Center District that prior to and during its change from a uniracial (predominantly white) to a biracial system and again to a uniracial (predominantly Negro) school system that the quality of their children's previous educational experiences did not eqiup them to compete on an equal basis with resident children in the same grade and classifications.

'These experiences made them aware that no one organization composed of one or several schools, could ef-

fectively coordinate the mutual concern of the many parents residing within the Center District. Thus out of the several discussions of groups of people whose primary concern was the adequate and equitable education of their children, this organization was born. It is felt that no better description of its purpose, its objective, and its reason for being can be found than in the preamble to its Constitution, which is:

'PREAMBLE: Our interest is in equal educational opportunities for all persons within the City of Detroit.

'We do not believe that such opportunities are possible within a segregated school system.

'We oppose a policy of containment of minority groups within specified boundaries, an example of which is the Center District. While the above is of utmost concern to us we are also aware that there is need for improvement and enrichment of the standards within this district in practice as well as in theory.

'We believe that once standards have become reasonably adequate, that such standards should be maintained. It should be further recognized that future population shifts brought about by urban redevelopment will adversely affect the above goals in the Center District, unless there is anticipation of the impact of this population growth upon this district.

'Since the inception of our organization we have noted the following:

'The public school system of the City of Detroit is divided into nine administrative districts, one of which is the Center District.

'Yet, every day, when the children in this city leave their homes to go forth to public schools, approximately one out of every four leaves a home in the Center District. Of the 154,969 children enrolled in public elementary schools as of September 30, 1960, 36,264 or 23.4 percent of these children leave a home in the Center District.

There are 221 elementary school buildings in the Detroit Public School System. Of these 28 are in the Center District. This means, then, that the 23.4 percent of the total elementary school population is accommodated in 12.7 percent of the buildings.

Fifteen percent of these children sit in classes of 40 to 44 students per class. This is in comparison to:

East	.13 percent
North	.05 percent
Northeast	.04 percent
Northwest	.08 percent
South	.01 percent
Southeast	.01 percent
West	.05 percent

Sixty-two and one-half percent of all the children in the city's elementary schools who sit in classes of 45 to 49 are children in the Center District. These schools in the Center District find their capacities short by 6,352 pupil stations. In other words, their capacities are overtaxed to the extent of 16 percent; and the future building program, as set forth by the superintendent's report of October 17, 1960, will make available only 11,189 additional pupil stations within the next ten-year period. However, this will be insufficient to meet the demands of the Center District. Therefore, it is apparent that a school bussing program will have to become a permanent part of the school housing program. Thus the manner in which the bussing program is administered becomes a matter of acute concern.

Presently, children are being bussed by grades. Under this system a number of problems are created:

1) It makes necessary a reorganization of the bussing school, as well as the school into which the children are bussed.

2) They are not integrated into the school into which they are bussed, except in minor instances.

3) There is a possibility of the separation of the family unit.

4) Parents are unable to establish a good rapport with the teachers and administrators in the new school since there exists a time limit in which these children will be members of that school.

'It is recommended that a policy of bussing by geographical areas instead of by grades be instituted so as to eliminate the above problems.

'The emphasis on curricula objective are not comparable in the various school districts of the Detroit School System. There is a tendancy in the Center District to stereotype the educational capacity of the children. This means that children entering the schools in this district whose background enables them to comprehend an enriched educational program, are not challenged.

'For example, one student in the Hutchins Intermediate School who desired to prepare for entrance into an Eastern college found that Latin was not offered, and only after considerable effort by members of the community, along with his family, was Latin placed back in the school curriculum. Many other instances can be cited upon request.

'Conversely, children whose initial capacity is retarded by deprived socio-economic circumstances also go unchallenged. The District Administrator has admitted that no program exists to take care of these children.

'The curriculum and counselling as they now exist, do not encourage students to achieve their maximum capacities. We feel that the responsibility for any inequities in the educational experience offered to any group of children within a given school system must be assumed by those persons charged with the overall responsibility of administering that system.

'Therefore, we recommend that strong policies be adopted by the top administration to erase inequities of the

Detroit Public School System, and a policy of supervision through all levels of administration be instituted at all levels of administration to insure equal educational opportunities to all children.

"The Citizens' Association for Better Schools."

"Q. Do you join in that statement in submission to the committee?

"A. Yes, I did."

• • •

Mr. Wells cited the example of the Center (administrative) District, where attendance boundaries were shaped in a gerrymandered fashion to conform to the racial residential pattern.

"Q. With regard to that same situation, you were expressing a problem which your committee had met in attempting to discuss this. Can you tell me how you came to be discussing this with the Board at that time?

"A. It was not with the Board of Education, I believe it was with the administration of the school system.

"Q. The administrative staff?

"A. Including the superintendent.

"Q. All right.

"A. Our initial concern about the boundaries of the center district grew out of the concern we had in 1960 about the changing of the attendance areas between the Central High School and the Mackenzie High School.

"Q. Is that the optional attendance area also set up in that?

"A. A part of that was optional. Well, let's put it that way, a part of it had been optional, the proposal was to eliminate the option. In the process of eliminating the option what it would mean would be that by and large the few black children who had been attending Mackenzie would have been pulled back into the Central area.

"Q. Mackenzie at that time was a majority white school?

"A. Predominatly white.

"Q. Central by that time had become black?

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"A. Predominatly black.

"Q. So the cancellation of the optional area which had been there had the effect of preventing black children choosing Mackenzie, is that correct?

"A. That is right.

"Q. Were there any other schools – there is a reference made to the establishment of the center district boundaries – were there any other schools which had not previously been in certain feeder patterns that were drawn back into the center district?

"A. I am trying to remember now as I said eleven years.

"Q. I understand.

"A. If I remember correctly, the Sherrill School which also had been a part of it, that portion north of Tireman had been attending Mackenzie and they in turn, the total school then would have been returned to the Chadsey area.

"Q. What about Tappan and that area, are you familiar at all with changes that took place?

"A. Tappan was the junior high school in which Winterhalter, the elementary school in the area south of Davison just west of Ewald Circle attended. At that time the students from that area attended Tappan and all students from Tappan attended Mackenzie.

"The new change would mean that the students from Winterhalter, and I think McKerrow which is just below Winterhalter would have attended Tappan through the 9th grade, but then had been pulled back into the center district to attend Central High School.

"The other students in Tappan would have gone to Mackenzie.

"Q. The other students in Tappan, were they predominatly white students?

"A. Yes. Our concern about this region really at that time was that we could draw a line which separated the black residents from the white residents and almost to the alley and that in effect was the boundary line of the center district."

There was evidence that school feeder patterns were changed so as to make particular junior high schools or senior high schools either generally white or generally black, as shown in the following testimony:

"MR. CALDWELL: Your Honor, I have copies of the Mumford High School district in 1959 which is taken from Plaintiff's Exhibit 78-A, and this makes it easier to see the schools.

"Q. Let's get back to the 1962-'63 overlay.

"Prior to the 1962-'63 – first of all, will you point out to the Court where the Vandenberg and Vernor Schools are.

"A. This triangle to the northwest corner of this area. (indicating)

"Q. Prior to 1962-63 where did the Vernor and Vanderburg youngsters go to high school?

"A. Mumford High School.

"Q. A boundary change was made in 1962-63?

"A. That's right.

"Q. Where did those youngsters go to school in that year?

"A. Ford High School.

"Q. How long did that feeder pattern continue?

"A. Until 1966-67 when they returned to Mumford.

"Q. All right.

"MR. CALDWELL: Plaintiffs' Exhibit 128-A, your Honor, reflects that in 1960 Vandenburg and Vernor were 0 percent black. Mumford was 16.1 black, Ford was .1 percent black. With regard to Vandenburg and Vernor, there was a gradual increase in the black population until 1966 when Vandenburg was 39.5 percent black and Vernor was 39.8 percent black.

"Then in 1967 the change was made taking Vandenburg and Vernor back into Mumford. Vandenburg had become 70 percent black, Vernor had become 63.2 percent black. That year the change was made and Mumford was 78.1 percent black, Ford was 4.1 percent black.

"Q. I believe that feeder pattern continued into the current school year?

"A. That is right.

"Q. Those schools now feed back into Ford High School this year?

"A. That is right."

The effect of such a policy was attested to by Dr. Gordon Foster of the University of Miami, director of the Florida School Desegregation Consulting Center:

"Q. The effect, Doctor, then, of the removal of Vandenberg and Vernor from the Ford feeder pattern into the Mumford feeder pattern, what was the effect in terms of race?

"A. The effect of this move in 1967-68 of the transfer back of the two elementary schools was to increase the segregation at Mumford, to take blacks from the Ford High School and, therefore, increase the segregated pattern there, and, in my opinion, it reinforced inevitably the perception that Ford would be kept white as a matter of basic policy and that Mumford would be a racially contained isolated high school attendance area."

Similar testimony regarding the segregative effect of altering school feeder patterns was given with respect to the Jefferson and Hutchins Junior High Schools, Garfield and Spain Junior High Schools, Burton and Irving Elementary Schools, Higginbotham Elementary School, Jackson and Foch Junior High Schools, Stellwagen, Keating and Clark Elementary Schools, Cleveland and Nolan Junior High Schools, Courville Elementary School, Ford and Brooks Junior High Schools, Osborne and Pershing High Schools, Parkman Elementary School, the Ellis, Sills, Newberry and Sampson Elementary Schools, and Northwestern and Chadsey High Schools.

(b) The District Judge made the following findings of fact pertaining to busing black children to black schools past white schools:

> "The Board, in the operation of its transportation to relieve overcrowding policy, has admittedly bused black pupils past or away from closer white schools with available space to black schools. This practice has continued in several instances in recent years despite the Board's avowed policy, adopted in 1967, to utilize transportation to increase integration.
>
> "With one exception (necessitated by the burning of a white school), defendant Board has never bused white children to predominantly black schools. The Board has not bused white pupils to black schools despite the enormous amount of space available in inner-city schools. There were 22,961 vacant seats in schools 90% or more black." 338 F.Supp. at 588.

The legal conclusion of the District Judge follows:

> "8. The practice of the Board of transporting black students from overcrowded black schools to other identifiably black schools, while passing closer identifiably white schools, which could have accepted these pupils, amounted to an act of segregation by the school authorities. Spangler v. Pasadena City Bd. of Ed., D.C., 311 F.Supp. 501." 338 F.Supp. at 593.

Additional support for the District Judge's legal conclusion includes: *United States* v. *School District 151*, 286 F.Supp. 786, 798 (N.D. Ill. 1967), *aff'd*, 404 F.2d 1125, 1131 (7th Cir. 1968), *on remand*, 301 F.Supp. 201, 211, 222 (N.D. Ill. 1969), *aff'd*, 432 F.2d 1147, 1150 (7th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971); *United States* v. *Board of School Commissioners, Indianapolis, Ind.*, 332 F.Supp. 655, 669 (S.D. Ind. 1971).

The following testimony pertains to busing black children from overcrowded black schools past white schools with available pupil capacity to other black schools:

> "Q. I am trying to anticipate, Mr. Ritchie's question. Have you noted some examples of the bussing of black children from black schools to other black schools?

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"A. I have.

"Q. Could you give us a couple illustrations?

"MR. BUSHNELL: While Dr. Foster is looking through his notes, might I make the request that we made yesterday that on conclusion of his testimony we have access to the notes made?

"MR. LUCAS: At the conclusion, yes. We have no objection to that.

"A. In 1960-61, and we don't have any record for '61-62 so I am not certain as to that year, students were transported from Angell to Greenfield Park. This has already been part of our testimony, I believe, 186 students and students from Angell to Higginbotham, 118 students. In 1969 –

"Q. Excuse me, Doctor, let me ask you if the Angell-Higginbotham – were there white schools available with space, from your examination of the records?

"A. Yes, there were.

"Q. Between Angell and Higginbotham?

"A. Yes, sir, I believe I testified to that before.

"Q. All right.

"A. In 1969 the Ruthruff Elementary School which was 99 percent black transported 143 children to Herman Elementary, 55 percent black.

• • •

"Q. (By Mr. Lucas, continuing) Dr. Foster, would you step to the map.

"I think we were talking about the Ruthruff-Herman Schools.

"A. Yes. We were testifying at recess about transportation of blacks past white schools. In 1969 we stated that Ruthruff Elementary which is here in the southeastern portion of the Mackenzie High School zone on the large 1970-71 attendance area map, in 1969 transported 143 children to Herman Elementary School which is just below the blue area on the undermap here – Herman Elementary School (indicating). Herman in 1969 was 55.6 percent black. Ruthruff was 99.1 percent black and I think it is important to note that the access

to Herman goes right past the Parkman Elementary School which at that time had 136 spaces available and according to their capacity figures —

"Q. Parkman was what percentage?

"A. Parkman I don't have the figure for '69 and '70. Parkman was 12.8 percent black."

• • •

"A. Another example was the Parker Elementary School which is in the general center of the Mackenzie High School zone. Parker in 1970 was 79.4 black; 61 children were bussed from Parker again to the Herman Elementary School which at that time was 58.5 percent black and again past the Parkman Elementary which in 1970 was 12.8 percent black.

"Q. Did Parkman have capacity at that time, Doctor?

"A. Parkman in '70, according to my data, had 121 spaces.

• • •

"Q. Excuse me, would you give us the A. L. Homes.

"MR. BUSHNELL: I thought the Court ruled on that?

"THE COURT: He says he is pursuing a non-cumulative matter here. If that be true he may go ahead.

"A. A. L. Holmes School, children were bussed from this school over to the McGraw School which is in the south end of the Northwestern District in center city. In 1970-71 the Post Junior High School, which is located —

"MR. BUSHNELL: If the Court please, Mr. Lucas just pointed out the location of Post which the witness obviously couldn't find on the map.

"THE COURT: Well, he hasn't moved it.

"A. I noted the west section of Cooley instead of the east. The Post Junior High School and Clinton Schools, which are in the east section of the Cooley High School attendance zone transported 54 students to the Jefferson School which is now in the Murray zone and it is located in the eastern section of the Murray High School attendance area. I think it is important to note that

these students who were bussed came from a considerable distance north and there were several possibilities —

"Q. Excuse me, were the Post children in a black school or white school?

"A. The Post School this year, 1970-71 was 99.3 percent black. The Clinton School from which they also came was 97 percent black.

"Q. What about Jefferson?

"A. Jefferson was 87.6 percent black. There were two or three other possibilities much closer to the Post-Clinton area. One would have been in the western portion of the Mackenzie district here (indicating).

"Q. What is the racial composition?

"A. At this time it had 35.4 percent black with a capacity of 109 stations available. Another possibility would have been the Vetal School in the Redford zone, the southern portion of the Redford High School zone, which at this time was 2 percent black with vacancies of 203 pupil stations and a third alternative could have been the Coffey School to the east of the Ford attendance area which at this time was 29 percent black with 69 pupil stations available.

"Q. Did you say to the east was part of the Ford attendance area or outside of that, Doctor?

"A. It's in the Ford attendance area.

• • •

"THE COURT: Well, to save time why don't we proceed on the assumption that that was his testimony. But if it proves otherwise we will strike it.

"MR. LUCAS: Thank you, sir.

"Q. (By Mr. Lucas) Doctor, I understand that the policy of the district is that bussing to relieve overcrowding would be done in such a manner as to improve integration at the receiving school. From your examination of the current bussing examples which you have given, do you have an opinion as to whether or not that policy has or has not been followed?

"A. Well, I think from the examples I have given so far it would give an indication that integration could

have been effected in a much better way if the children, instead of going to the schools would have been dropped off at other schools where the racial balance was quite different.

* * *

"Q. Are there any white schools from your examination of data, Doctor Foster, between Angell and Higginbotham which had capacity at that time?

"A. Yes, there were several which were a good deal closer to Angell than Higginbotham. The effect of this sort of zoning pattern was to provide segregated student ratios at all three of the elementary schools, and in terms of things that could be done or could have been done at that particular time to correct the segregated situation, it is my opinion that, first of all, the students being bussed from Angell could have been dropped off at any number of places on the way to Higginbotham, schools which had the space and had a better racial composition for this sort of input. This having been done, zone lines could have been redrawn at these three schools to have approached a racial balance situation which, in my opinion, would have helped to stabilize the situation at that time. This would have also assisted in the overcrowding at Pasteur and a couple of classrooms extra at Higginbotham.

"Q. Do you have an opinion, Doctor, as to the perception created by the maintenance of the Higginbotham School under those circumstances, including the transportation of black students from Angell into it?

"A. Well, it is obvious that if you transport black children past white schools to an all black school that the community is going to perceive this as a segregated intent, a segregated action. If you have a boundary situation which isolates and enforces black students to a particular area when the boundary lines could be changed to effectuate a better pattern racially, then it seems to me that community perception would also be that the school is not doing what it could in terms of integration and equal opportunity.

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"Q. Doctor, from your examination of the data in 1960 are there any administrative reasons, any administrative problems which would indicate to you a reason why this boundary was maintained rather than drawn in some other fashion?

"A. In terms of school capacity there are none, no."

Defendant's witness (Mr. Henrickson) admitted instances of busing black students past closer white schools to black schools:

"Q. We find on the under and over capacity map in the Higginbotham area that there were three schools surrounding Higginbotham. Vernor, which is listed as being 121 over capacity; MacDowell, 103, is it? Pasteur, 90. At the same time we find that Higginbotham was 489 under capacity. Is that what the exhibit shows, sir?

"A. Yes.

"Q. We also know, do we not, that Pasteur, MacDowell and Vernor were white schools?

"A. Both Pasteur and MacDowell at that time, as I recall, had some beginning of black students as a result of the growth of the settlement of the Higginbotham area.

"Q. They were predominatly white schools at that time?

"A. Yes.

"Q. Higginbotham was all or virtually all black?

"A. Yes.

"Q. Indeed, it had been the same in 1950, had it not?

"A. Yes.

"Q. At the same time that we are talking about you were transporting youngsters from Angell to Higginbotham, is that correct?

"A. Yes.

"Q. Those were black kids being transported from Angell to Higginbotham?

"A. Yes.

"Q. We also know on that exhibit that they were

transported past such schools as Fitzgerald and Clinton which had more than enough capacity to handle them?

"A. We have made no denial of that."

For some years it was a Board of Education policy to transport classrooms of black children intact to white schools where they were educated in segregated classes.

Testimony as to the intact busing practice follows:

"Q. (By Mr. Lucas, continuing) Will you go into the Detroit system, Doctor, on transportation.

"A. Answering it generally, counsellor, my answer would be that the intact bussing is the practice of transporting classrooms of children intact from one school to another and leaving them intact when they are educated at the receiving school.

"Q. Doctor, when such transportation occurs from a school which is 90 percent or more black to a school which is predominantly a white school, what effect, if any, does this have in terms of racial segregation on those children?

"A. This would lead to what we call classroom segregation or segregation within a particular school. It could be sometimes resegregation, but essentially it is a segregated situation within a school which could be segregated or not segregated generally.

"Q. Doctor, in your experience with school segregation and school desegregation plans, is this a technique which you have had to deal with in the past?

"A. On occasion, yes, sir.

"Q. Doctor, did you examine data or relevant information with respect to the transportation practices in the Detroit school system in connection with this type of bussing, intact bussing?

"A. Yes, sir.

"Q. What did your examination reveal, Doctor?

"A. It is my understanding from the data that there was intact bussing generally in the late '50's, as I said, and early '60's.

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"Q. How did that intact transportation operate, Doctor?

"A. It involved transporting classrooms in whole from one school to another receiving school and at the receiving school the classrooms were kept intact for instructional purposes.

"Q. Was this policy changed at any time, Doctor, as far as you know?

"A. It is my understanding it was changed in the middle '60's but I don't remember the exact date.

"Q. What would the change be, Doctor? What type of bussing would result in terms of relieving overcrowding?

"A. You simply gather children up on a geographical basis and transport them and assign them at random to whatever grade they are in the receiving school rather than keeping them in an intact classroom."

Segregating children by race within schools has been held repeatedly to be unconstitutional. *Jackson* v. *Marvell School District No. 22*, 445 F.2d 211, 212 (8th Cir. 1970); *Johnson* v. *Jackson Parish School Board*, 423 F.2d 1055 (5th Cir. 1970).

The record indicates that in at least one instance Detroit served a suburban school district by contracting with it to educate its black high school students in a Detroit high school which was overwhelmingly black by transporting them away from nearby suburban white high schools and past Detroit high schools which were predominately white.

The District Judge found on this score that for years black children in the Carver School District were assigned to black schools in the inner city because no white suburban district (or white school in the city) would take the children.

This finding is supported by the testimony of Detroit School Superintendent Drachler, which follows:

"Q. When was the Carver District in existence as a separate entity?

"A. The Carver District? The Carver is not in Detroit.

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"Q. Is it a separate school district whose students attended some Detroit high schools, in particular Northern?

"A. Oh, I see what you're referring to. I am told that back in '57, '58, at that time I was not in Central Office, there were some students from Carver District who did not have a place for adequate high school facilities. An arrangement was made with Detroit for the Carver students to come in on buses and go to Northern High School. Now, the nearest school to Carver was Mumford at the time. And they did go past Mumford towards Northern.

"Q. Is Carver a black district?

"A. Yes, black and very poor.

"Q. Has Carver District subsequently merged with Detroit?

"A. Oak Park.

"Q. With Oak Park?

"A. That's right.

"Q. And at that time the transportation was terminated?

"A. That's right. By the way, as a result of those youngsters coming, there was a rumor spread that Detroit children were being bussed, say, from the Higginbotham, which is north — Higginbotham area which is north of Mumford High School area but in Detroit, that they were being bussed to Northern, too, because they were black students, people saw black students from the Eight Mile area coming down. But to the best of my knowledge these were outside students.

"Q. There were black children being bussed to Higginbotham, weren't they?

"A. There were black children being bussed to Higginbotham.

"Q. From Angell?

"A. From Angell past some white schools. And when the issue was brought to Doctor Brownell's attention by me in about '59 or '60 — there were a series of instances

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like that. There was the Angell, there was from the military fort in the southwest, they were bussing their own children up to the Noble, and Doctor Brownell, as soon as it was brought to his attention, abolished that as well as the optional areas.

"Q. Was this so-called intact bussing, that is a class being brought as a unit?

"A. Generally speaking, yes. That policy of changing to geographic bussing occurred about '62-'63 as a result of the Equal Education Opportunities Committee.

"Q. Was all of the bussing done in the City of Detroit of an intact nature until the Equal Opportunities study?

"A. To the best of my knowledge it was. I know when my children were being bussed, they were bussed intact."

(2) Optional Areas.

The record demonstrates that in many instances when neighborhoods in Detroit began to experience some immigration of black families, it was Board of Education policy to create optional attendance zones, thereby allowing white students to change schools to all white or predominately white schools, generally located farther toward the city limits. For many years the record indicates this practice to have been pervasive. It continued in at least one instance up to the 1970-71 school year.

As to optional attendance zones, the District Judge found:

"During the decade beginning in 1950 the Board created and maintained optional attendance zones in neighborhoods undergoing racial transition and between high school attendance areas of opposite predominant racial compositions. In 1959 there were eight basic optional attendance areas affecting 21 schools. Optional attendance areas provided pupils living within certain elementary areas a choice of attendance at one of two high schools. In addition there was at least one optional area either created or existing in 1960 between two junior high

schools of opposite predominant racial components. All of the high school optional areas, except two, were in neighborhoods undergoing racial transition (from white to black) during the 1950s. The two exceptions were: (1) the option between Southwestern (61.6% black in 1960) and Western (15.3% black); (2) the option between Denby (0% black) and Southeastern (30.9% black). With the exception of the Denby-Southeastern option (just noted) all of the options were between high schools of opposite predominant racial compositions. The Southwestern-Western and Denby-Southeastern optional areas are all white on the 1950, 1960 and 1970 census maps. Both Southwestern and Southeastern, however, had substantial white pupil populations, and the option allowed whites to escape integration. The natural, probable, foreseeable and actual effect of these optional zones was to allow white youngsters to escape identifiably 'black' schools. There had also been an optional zone (eliminated between 1956 and 1959) created in 'an attempt . . . to separate Jews and Gentiles within the system,' the effect of which was that Jewish youngsters went to Mumford High School and Gentile youngsters went to Cooley. Although many of these optional areas had served their purpose by 1960 due to the fact that most of the areas had become predominantly black, one optional area (Southwestern-Western affecting Wilson Junior High graduates) continued until the present school year (and will continue to effect 11th and 12th grade white youngsters who elected to escape from predominantly black Southwestern to predominantly white Western High School). Mr. Henrickson, the Board's general fact witness, who was employed in 1959 to, *inter alia*, eliminate optional areas, noted in 1967 that: 'In operation Western appears to be still the school to which white students escape from predominantly Negro surrounding schools.' The effect of eliminating this optional area (which affected only 10th graders for the 1970-71 school year) was to decrease Southwestern from 86.7% black in 1969 to 74.3% black in 1970." 338 F.Supp. at 587-88.

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From these facts the District Judge arrived at the following legal conclusion:

> "7. The Board's policy of selective optional attendance zones, to the extent that it facilitated the separation of pupils on the basis of race, was in violation of the Fourteenth Amendment. Hobson v. Hansen, D.C., 269 F.Supp. 401, aff'd sub nom., Smuck v. Hobson, 408 F.2d 175. [(D.C. Cir. 1969)]." 338 F.Supp. at 593.

Additional support for the District Judge's legal conclusion includes: *United States* v. *Texas Education Agency*, — F.2d — (5th Cir. 1972); *Northcross* v. *Board of Education of Memphis*, 333 F.2d 661, 665-66 (6th Cir. 1964) (different but analogous situation); *United States v. Board of School Commissioners of Indianapolis*, 332 F. Supp. 655, 668 (S.D. Ind. 1971); *Spangler* v. *Pasadena City Board of Education*, 311 F.Supp. 501, 502 (C.D. Cal. 1970).

The effect of use of optional zones was described in Dr. Foster's testimony:

> "The first method or technique I might cite that is used to maintain segregation would be the use of optional zones.
>
> "Would it be possible for me to step to the board to illustrate?
>
> "Q. Please do.
>
> (The witness proceeded to the blackboard.)
>
> "A. Optional zones are sometimes also referred to as dual zones or dual overlapping zones. I think it will be easier for me to illustrate this briefly.
>
> (The witness drew a sketch on the board.)
>
> "A. If you have, let's say, two high school districts, District X and District Y, frequently when you set up an optional zone you carve the zone out of one district, occasionally two, but assume we carve it out of District Y and the children in this optional zone are then permitted to go to either high school X or high school Y, this becomes in a sense an overlapping zone because

if we refer to the boundaries of school District X at this point it not only includes the previous boundary but also takes in the optional zone.

"District Y in turn would include its previous boundaries, also including the optional zone. I think this may explain the origin of the connotation of the word 'overlapping'.

"Essentially optional zones are set up for two or three reasons, one is to allow white students or black students the option of attending one of the two attendance areas which make up the boundaries of the zone and another is for, occasionally for religious purposes to provide alternatives for persons of different religions. Sometimes these are set up for socio-economic reasons and I have on occasion seen them set up by boards of superintendents as political gimicks in order to help pass a bond issue or one thing or another or a school board or superintendent will set up temporary optional zones as a favor to certain constituents in return for assistance in helping the school board with one thing or another.

"I think in the frame work in which we operate they are used primarily for maintaining segregated patterns.

• • •

"Q. Dr. Foster, have you made a study and analysis of optional zones in the Detroit school system?

"A. Yes, I have."

Dr. Foster's analysis of the purpose and effect of each optional zone in existence in the Detroit School District is exemplified in his testimony on the Mackenzie-Central option.

"Q. Doctor Foster, do you have an opinion as to the administrative use of the optional attendance zone in 1960 between and prior to that in Mackenzie-Central area?

"A. Yes. I think it was used primarily — you mean as to the purpose of it?

"Q. Well, as to whether or not it had any administrative value that you know of. Doctor, aside from race?

"A. In terms of assignment I can see no advantage to it.

• • •

"Q. Do you have an opinion as to its use in terms of segregation or desegregation, Doctor Foster?

"A. In my opinion it was used as an optional zone to allow whites during the period it was in existence in the '50's and also until such time as it was done away with in 1962 to be assigned to predominantly white Mackenzie High School.

"Q. Doctor Foster, from your examination of the 1950 census and in turn the 1960 census exhibits, do you have an opinion as to the effect of such an optional zone on the community, residence pattern in the community?

• • •

"A. Community people and residents in a situation such as this generally have a perception that there is something wrong with their school, that the whites need an optional zone to get out into a less black situation and, therefore, this increases their perception of racial isolation and, in fact, physical containment.

"Q. Does this have an effect, Doctor, in terms of the residence pattern? I believe you testified in 1950 the optional area was entirely white or zero to 4.9 per cent white.

• • •

"A. In my opinion this tends to increase the instability of the community because they generally feel this is an ad hoc temporary interim situation and it increases white flight in this sort of situation.

• • •

"Q. Doctor Foster, does the use of these techniques in some areas have an effect in terms of the perception of the community of schools besides the actual two schools to which the option was involved?

• • •

"A. Thank you. Yes, I think the perception is not only

of rank and file community residents, but people of considerable influence in the community, along with School Board administration people, School Board members, School Board officials. In many cases they have substantiated this perception that I have recounted; that the optional zones did lead to greater pupil segregation and a feeling of frustration that the school authorities were not doing what was called for in terms of desegregation, and it had a generally debilitating effect on the image of the schools as far as all of these groups were concerned."

Mr. Henrickson, defendant School Board's principal witness and divisional director of planning and building studies in the School Housing Division, did not deny the discriminatory effect of at least some of these optional zones.

"Q. In 1959 optional areas frustrated integration, did they not?

"MR. BUSHNELL: Objection to the form of the question.

"THE COURT: He may answer.

"A. Some of these areas in 1959 had no effect whatever with movement of black or white students. They were either all black or all white. Some of them such as the Western-Southwestern area can be said to have frustrated integration and continued over the decade."

(3) Building Construction.

The District Judge found and the record contains evidence that the Detroit Board of Education practices in school construction generally tended to have segregative effect; the great majority of schools were built in either overwhelming all black or all white neighborhoods so that the new schools opened as one race schools.

The District Judge's school construction findings were as follows:

"In 1966 the defendant State Board of Education and Michigan Civil Rights Commission issued a Joint Policy Statement on Equality of Educational Opportunity, requiring that

> 'Local school boards must consider the factor of racial balance along with other educational considerations in making decisions about selection of new school sites, expansion of present facilities . . . . Each of these situations presents an opportunity for integration.'

Defendant State Board's 'School Plant Planning Handbook' requires that

> 'Care in site locations must be taken if a serious transportation problem exists or if housing patterns in an area would result in a school largely segregated on racial, ethnic or socio-economic lines.'

The defendant City Board has paid little heed to these statements and guidelines. The State defendants have similarly failed to take any action to effectuate these policies. Exhibit NN reflects construction (new or additional) at 14 schools which opened for use in 1970-71; of these 14 schools, 11 opened over 90% black and one opened less than 10% black. School construction costing $9,222,000 is opening at Northwestern High School which is 99.9% black, and new construction opens at Brooks Junior High, which is 1.5% black, at a cost of $2,500,000. The construction at Brooks Junior High plays a dual segregatory role: not only is the construction segregated, it will result in a feeder pattern change which will remove the last majority white school from the already almost all-black Mackenzie High School attendance area.

"Since 1959 the Board has constructed at least 13 small primary schools with capacities of from 300 to 400 pupils. This practice negates opportunities to integrate, 'contains' the black population and perpetuates and compounds school segregation." 338 F.Supp. at 588-89.

Other cases in which such findings have been held to constitute a de jure act of segregation include: *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 21 (1971); *Cisneros* v. *Corpus Christi Independent School Dist.*, — F.2d — (5th Cir. 1972), *cert. applied for*, 41 U.S.L.W. 3255 (Oct. 31, 1972); *Kelly* v. *Guinn*, 456 F.2d 100 (9th Cir. 1972), *petition for cert. filed*, 41 U.S.L.W. 3114 (U.S. Aug. 28, 1972); *Davis* v. *School District of Pontiac*, 443 F.2d 573, 576 (6th Cir.), *cert. denied* 402 U.S. 913 (1971); *Sloan* v. *Tenth School District*, 433 F.2d 587, 590 (6th Cir. 1970); *United States* v. *Board of Education of Tulsa*, 429 F.2d 1253, 1259 (10th Cir. 1970); *Brewer* v. *School Board of Norfolk*, 397 F.2d 37, 42 (4th Cir. 1968); *United States* v. *Board of Public Instruction*, 395 F.2d 66, 69 (5th Cir. 1968); *Kelley* v. *Altheimer, Arkansas Public School Dist. No. 22*, 378 F.2d 483, 496-97 (8th Cir. 1967); *Johnson* v. *San Francisco Unified School District*, 339 F.Supp. 1315, 1326, 1341 (N.D. Cal. 1971); *United States* v. *Board of School Commissioners of Indianapolis*, 332 F.Supp. 655 (S.D. Ind. 1971); *Spangler* v. *Pasadena City Board of Education*, 311 F.Supp. 501, 522 (C.D. Cal. 1970); *United States* v. *School District 151*, 286 F.Supp. 786, 798 (N.D. Ill.), *aff'd*, 404 F.2d 1125 (7th Cir. 1968); *Lee* v. *Macon County Board of Education*, 267 F.Supp. 458, 472 (M.D. Ala.), *aff'd per curiam sub nom.*, *Wallace* v. *United States*, 389 U.S. 215 (1967).

Record evidence pertaining to Detroit Board of Education building construction practices and their results include:

> "Q. Doctor Foster, I show you a document in evidence, Plaintiff's Exhibit 70. I direct your attention to page 15 of the exhibit. The exhibit is School Planning Handbook, Bulletin 412, revised, January, 1970, Michigan Department of Education. Directing your attention to Chapter 2, the School Site, and the last full paragraph in the left-hand column on page 15, Doctor, would you read that paragraph?
>
> "A. 'Care in site location must be taken if a serious transportation problem exists or if housing patterns in

an area would result in a school largely segregated on racial, ethnic or socio-economic lines.'

"Q. Doctor, would you step down to the map, please? Do you have a copy, Doctor, of Plaintiff's Exhibit 79?

"A. Yes, I do.

"Q. Doctor, would you examine Plaintiff's Exhibit 153, which shows new school construction, 1960 to 1970? Perhaps you had better step back here. Doctor, the black squares on here represent schools opening 80 to 100 per cent black in pupil enrollment. Would you direct your attention to the Drew Junior High School on the map and examine the exhibit and tell me when Drew was opened?

"A. According to the exhibit, the Drew Junior High School was opened in 1970.

"Q. And what was it opened as in terms of its enrollment, Doctor?

"A. 1,587 students.

"Q. And its percent black?

"A. 95 per cent black.

"Q. And the Eileen Primary School, Doctor, can you locate it on the map?

"A. The Eileen Primary is in the Cooley High School zone, I believe.

"Q. And when did it open, Doctor?

"A. 1970.

"Q. And what was its enrollment and its pupil population in terms of black?

"A. 333 students. The per cent black was 99.1.

"Q. Would you examine the map and locate the E. M. Turner Primary?

"A. Yes.

"Q. What year was that opened, Doctor?

"A. The Turner Primary was opened in 1969.

"Q. And its enrollment of pupil population?

"A. 362 pupils, 97.5 percent black.

"Q. Can you find the Stewart School on there, Doctor?

"A. The Stewart School is in the same general area as Turner, a little to the south.

"Q. What year was it opened?

"A. 1970.

"Q. Its population and percent black?

"A. 766 enrollment, 98.8 percent black.

"Q. Marxhausen Primary, Doctor, can you locate that on the map?

"A. Marxhausen is in the Finney zone.

"Q. Is that near or far away from the A. L. Holmes School, Doctor?

"A. As I remember, rather close to the Holmes School.

"Q. Can you locate the Holmes School with reference to that?

"A. The Holmes School is the next one to the northwest.

"Q. And what was its pupil population when it opened?

"A. Marxhausen was opened in 1970 with a pupil population of 302, 92.4 percent black.

"Q. Would you locate Mack Primary, Doctor?

"A. Mack Primary is also in the Finney zone.

"Q. And when did it open?

"A. Mack opened in 1970 with an enrollment of 173, 98.8 percent black.

"Q. Could you locate the Angell Primary area, Doctor?

"A. The Angell area is in the Northwestern attendance zone.

"Q. And what was its enrollment and percent black?

"A. Angell was 1,282 students when it opened in 1970. The percent black was 99.9

"Q. Is there an asterisk by that particular school, Doctor?

"A. On the exhibit?

"Q. Yes.

"A. Yes, there is.

"Q. Would you refer to the cover and tell us what that asterisk indicates?

"A. It says, 'The racial count data included in existing school with the same name.'

"Q. Can you locate the Stark School, Doctor?

"A. The Stark School is in the Southeastern zone.

"Q. And what was its enrollment?

"A. The enrollment was 822 when it opened in 1969.

"Q. And the percent black?

"A. 98.4 percent black.

"Q. Can you locate the new King Senior High School, Doctor?

"A. The new King Senior High School?

"Q. Yes.

"A. Here.

"Q. When did it open?

"A. It opened in 1968.

"Q. What was its enrollment?

"A. 1,897 pupils.

"Q. And its percent black?

"A. 98.8 percent black.

"Q. Can you locate the Field Annex, Doctor?

"A. Just to the northeast of King, the Field Annex.

"Q. And what was its enrollment?

"A. 461.

"Q. Its per cent black?

"A. 90.5 per cent black.

"Q. Can you locate the Glazer School, Doctor Foster?

"A. The Glazer School is in the Central zone.

"Q. And when did it open?

"A. In 1967.

"Q. And what was its enrollment, Doctor?

"A. 850 students.

"Q. What was its per cent black?

"A. 100 per cent black."

Similar testimony was given with respect to the Stevenson, Cortez, Beaubien, Sander, St. Clair Annex, Murray, Kettering, Krolik, Joy, Tendler, Belleville, McGraw, Knudsen, Keidan, Jamieson, Butzel, Woodward, Tendler and Norvell Schools. White schools built to accommodate white residential areas in-

cluded Fox, Lessenger, Murphy, Taft, Fleming, Earhart, Reeves, Brooks and McKenny Annex.

"Q. Thank you, Doctor.

"Doctor Foster, from your examination of the pattern of construction in this school system, 1960 to 1970, do you have an opinion as to the effect of that pattern of construction on segregation in the Detroit School System?

"A. My opinion is that construction practices were followed in such a way as to increase segregation. I say this because of the large number of schools that were opened that were either all black or all white or with a disproportionate number of one race or the other upon opening.

• • •

"Q. (By Mr. Lucas) Does the location of a school in a particular place have a long term effect on a school system?

"A. In terms of the nature of the pupils assigned to the school, do you mean?

"Q. Yes, sir.

"A. Yes, it does.

"Q. Are there alternatives in schoolhouse construction which can or should be considered by a school district in terms of affecting the racial composition of student bodies?

"A. In terms of site selection there are, yes.

"Q. What are some of the alternatives which can or should be utilized, in your opinion, Doctor?

"A. It is customary in this day and age to consider the problem of integration or segregation very carefully in selecting sites for school buildings and, well, this was pointed out, I believe, in the bit I read from the Michigan State Department.

"Q. What effect in terms of perception of the community does it have when a school is opened with an overwhelming enrollment of one race or the other?

"A. Generally the community perceives, in my opinion, that the school has been thought of as being, going to be an all white school or all black school and in either case generally that it is racially isolated."

(B) The constitutional violations found to have been committed by the State of Michigan.

(1) Under Michigan law, M.S.A. § 15.1961, school building construction plans must be approved by the State Board of Education. Prior to 1962 the State Board also had statutory authority to supervise school site selection. The proofs concerning the effect of Detroit's school construction program are therefore largely applicable to show State responsibility for the segregatory results.

(2) During the critical years covered by this record the State of Michigan discriminated against Detroit by allowing the Detroit School District a capital improvement bonding authority of only two percent as compared to five per cent for all other school districts in the State up to the year 1969.

(3) During the critical years covered by this record the School District of Detroit was denied any allocation of State funds for pupil transportation, although such funds were made generally available to all students who lived over a mile and a half from their assigned schools in rural outstate Michigan, and although some suburban districts continued to receive State transportation money because of a "grandfather clause" which continues their status of some years ago. See S.B. 1269, REG. SESSION, Sec. 71(2)(a)(b) (1972).

(4) In 1970 the Detroit School Board undertook implementation of its April 7 desegregation plan applicable to its high schools. On meeting considerable resistance thereto, it nonetheless proceeded. At that point the State Legislature intervened by Act 48 of Public Acts of 1970 specifically overruling the Detroit Board of Education's desegregation plan. While this statute has since been invalidated by judgment of

this court, its contribution to preventing desegregation and to continuing and increasing segregation of the Detroit school system cannot be overlooked.

(5) Finally, the cross-district transportation of black high school students from the Carver School, located in Ferndale school district, to a black high school in Detroit could not have taken place without the approval, tacit or express, of the State Board of Education. (See *supra* pp. 27-29)

The District Judge's findings pertaining to constitutional violations by the State of Michigan are as follows:

> "The State and its agencies, in addition to their general responsibility for and supervision of public education, have acted directly to control and maintain the pattern of segregation in the Detroit schools. The State refused, until this session of the legislature, to provide authorization or funds for the transportation of pupils within Detroit regardless of their poverty or distance from the school to which they were assigned, while providing in many neighboring, mostly white, suburban districts the full range of state supported transportation. This and other financial limitations, such as those on bonding and the working of the state aid formula whereby suburban districts were able to make far larger per pupil expenditures despite less tax effort, have created and perpetuated systematic educational inequalities.
>
> "The State, exercising what Michigan courts have held to be is 'plenary power' which includes power 'to use a statutory scheme, to create, alter, reorganize or even dissolve a school district, despite any desire of the school district, its board, or the inhabitants thereof,' acted to reorganize the school district of the City of Detroit.
>
> "The State acted through Act 48 to impede, delay and minimize racial integration in Detroit schools. The first sentence of Sec. 12 of the Act was directly related to the April 7, 1970 desegregation plan. The remainder of the section sought to prescribe for each school in the eight districts criterion of 'free choice' (open enrollment) and 'neighborhood schools' ('nearest school priority accep-

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tance'), which had as their purpose and effect the maintenance of segregation.

"In view of our findings of fact already noted we think it unnecessary to parse in detail the activities of the local board and the state authorities in the area of school construction and the furnishing of school facilities. It is our conclusion that these activities were in keeping, generally, with the discriminatory practices which advanced or perpetuated racial segregation in these schools." 338 F. Supp. at 589.

The District Judge arrived at the following legal conclusions:

"11. Under the Constitution of the United States and the constitution and laws of the State of Michigan, the responsibility for providing educational opportunity to all children on constitutional terms is ultimately that of the state. Turner v. Warren County Board of Education, D.C., 313 F.Supp. 380; Art. VIII, §§ 1 and 2, Mich. Constitution; Daszkiewicz v. Detroit Bd. of Ed. of City of Detroit, 301 Mich. 212, 3 N.W.2d 71.

"12. That a state's form of government may delegate the power of daily administration of public schools to officials with less than state-wide jurisdiction does not dispel the obligation of those who have broader control to use the authority they have consistently with the constitution. In such instances the constitutional obligation toward the individual school children is a shared one. Bradley v. Sch. Bd. of City of Richmond, D.C., 51 F.R.D. 139, 143.

"13. Leadership and general supervision over all public education is vested in the State Board of Education. Art. VIII, § 3, Mich. Constitution of 1963. The duties of the State Board and superintendent include, but are not limited to, specifying the number of hours necessary to constitute a school day; approval until 1962 of school sites; approval of school construction plans; accreditation of schools; approval of loans based on state aid funds; review of suspensions and expulsions of individual students for misconduct [Op.Atty.Gen., July 7, 1970, No.

4705]; authority over transportation routes and disbursement of transportation funds; teacher certification and the like. M.S.A. 15.1023(1), M.C.L.A. § 388.1001. State law provides review procedures from actions of local or intermediate districts (see M.S.A. 15.3442, M.C.L.A. § 340.442), with authority in the State Board to ratify, reject, amend or modify the actions of these inferior state agencies. See M.S.A. 15.3467; 15.1919(61); 15.1919(68 b); 15.2299(1); 15.1961; 15.3402, M.C.L.A. §§ 340.467, 388.621, 388.628(a), 388.681, 388.851, 340.402; Bridgehampton School District No. 2 Fractional of Carsonville, Mich. v. Supt. of Public Instruction, 323 Mich. 615, 36 N.W.2d 166. In general, the state superintendent is given the duty '[t]o do all things necessary to promote the welfare of the public schools and public educational instructions and provide proper educational facilities for the youth of the state.' M.S.A. 15.3252, M.C.L.A. § 340.252. See also M.S.A. 15.2299(57), M.C.L.A. § 388.717, providing in certain instances for reorganization of school districts.

"14. State officials, including all of the defendants, are charged under the Michigan constitution with the duty of providing pupils an education without discrimination with respect to race. Art. VIII, § 2, Mich. Constitution of 1963. Art. I, § 2, of the constitution provides:

> 'No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.'" 338 F.Supp. at 593-94

Some of the evidence in this record supporting the District Judge's findings of State acts which discriminatorily affected the Detroit Board of Education and contributed to pupil segregation follows. The State statutory scheme of support of transportation for school children directly discriminated against

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Detroit. Dr. John W. Porter, the State Superintendent of Public Instruction in Michigan, testified as to the State transportation aid formula:

"Q. (By Mr. Lucas) Dr. Porter, does the State pay the cost of pupil transportation in the State of Michigan?

"A. The State pays roughly 75 percent of the cost. Last year the appropriation was $29 million.

"Q. Do you know what percent of the school children in the State of Michigan are transported to the school at public expense?

"A. Yes, I do. 40 percent of all students in Michigan are transported. That equates out to about 833,000 students last year.

"Q. Dr. Porter, is there some formula in terms of distance which makes a child eligible for transportation that would be aided by the state?

"A. Yes. It is a very complicated formula that 197 computations, and we are in the process right now of reducing this —

"Q. (Interposing) You mean the financial formula is complicated. But, in terms of distance from his home to the school —

"A. A mile and a half outside the city limits. Until this year the legislature amended the Act based upon the recommendations of the State Board of Education to allow for in-city transportation which we had never had before. The legislature did not appropriate funds for that. So, now the funds that are now used are basically for rural areas and suburban areas where the students live a mile and a half from the school.

"Q. When you say 'city,' is there some limitation? For instance, would Grosse Pointe, Harper Woods, areas like that that surround the City of Detroit, are they eligible for transportation?

"A. In the in-city. But, if the students come across the city boundary lines they live more than a mile and a half, which is quite prevalent throughout the state, then they are eligible for the funds.

"Q. Well, I think my question may have been confusing. Is there some type of city — is it just anyplace incorporated as a city that is differentiated from the rural areas, or certain cities elegible for this state aid at the present time and receive the funds —

"THE COURT: I think what Mr. Lucas is trying to get at is whether under the old practice whether any city has ceased state aid for transportation within the city.

"A. Yes, we have a number of instances where the city would be receiving aid for transportation, because the law says that if the bus in order to get the students to the school crosses outside of the city boundary, the city is then eligible for aid, and we, and we have a number of instances where that exists.

"THE COURT: In other words, where the student originates his ride outside the city limits transportation is assisted?

"A. That's right, or where the student lives in the city but the bus has to go outside of the city and come back he is also eligible. This, however, does not negate local city officials, school board officials from providing transportation. There is no prohibition against that.

"Q. (By Mr. Lucas) You said the legislature changed the law but didn't provide the money. Now, they are eligible for state aid but it is unfunded now, is that what you are saying?

"A. The law was changed last year to permit in-city bus transportation but in changing the law the legislature said our department had to disburse the funds to the eligible existing areas which meant that since they did not increase the amount of funds appropriated we could not provide for in-city transportation.

"Q. If a child lives in the city and lives more than a mile and a half from the school to which he is assigned he may not receive the state aid because it is unfunded at the present time?

"A. That is correct.

"Q. But if he lives the same distance away and lived

outside the City of Detroit, for example, then he could receive state aide?

"A. That is correct, or any other area."

The record demonstrates that the State also discriminated against the Detroit school system by limiting Detroit's capital improvement bonding authority to two per cent of assessed valuation until 1969. This compares with a bonding authority of five per cent provided for other school districts.

"Q. Mr. Brown, one other question, sir. There has been a good deal of discussion in the course of this trial about bonding authority and use made of the funds that are derived from that authority. I would like to ask you several questions, sir, about that and see if we can't get it all in order. Has the district — and I ask you this question on the basis of your experience with the State Board of Education as well as being secretary and business manager of the Detroit district — has the Detroit Board of Education always had bonding authority so that bonds could be issued without vote of the people?

"A. Has it always had?

"Q. Yes, sir, if you know.

"A. I do not know always. It has for many years.

"Q. What was the level of that bonding authority?

"A. It went from 2 percent —

"Q. I am talking about originally from the time you first knew about it. It was a 2 percent —

"A. 2 percent of equalized valuation that could be levied by the Board, then it was changed.

"Q. All right. Now, in order to get more than 2 percent of the equalized valuation of the property within a district what did the Board have to do?

"A. The Board of Education had to take the matter to the taxpaying electors of the city to get approval to bond the district beyond that capacity.

"Q. Who is eligible to vote in those bonding elections at that time?

"A. At that time the taxpaying electors of the district.

"Q. You mean by that the property owners?

"A. Yes.

"THE COURT: Real estate property owners?

"A. Yes.

"Q. You indicate that that 2 percent authority was increased. When and how much?

"A. I'm sorry, I can't tell you the exact year. It was increased by 1 percent. It went from 2 to 3, but I can't quote the year.

"Q. How did that authority of 3 percent compare to the authority granted all other districts in the state?

"A. It was less by 2 percent. In other words, all other districts in the state had the authority to bond up to 5 percent of the state equalized valuation while Detroit was limited to 3.

"THE COURT: This is true at a time when Detroit only had a 2 percent authority?

"A. This is correct.

"Q. Now, sir, when was the authority increased from 3 percent?

"A. During the last session of the Legislature; not the current one but the one immediately preceding so that for this year we have the 5 percent authority that the other districts now have.

"Q. Has that extra authority been utilized by the district?

"A. No.

"Q. As yet?

"A. Not as yet. The plans are being made and we have to carry forward quite a program of determining priorities and so forth, so it has not been used yet.

"Q. So the bonding authority currently being used by the district is the authority that it had before the 1970 session of the Legislature?

"A. This is correct.

"Q. What is the state of that prior bonding authority? Is it all exhausted or is there some reserve still available?

"A. It is exhausted to this extent. The Board of Education has adopted a program which uses all of that authority. We have presently before the Municipal Finance Commission in Lansing the last amount of that authority and in the amount of $22,950,000. We have not as of today received approval of that, but the Board's program calls for the full authority."

The clearest example of direct State participation in encouraging the segregated condition of Detroit public schools, however, is that of school construction in Detroit and the surrounding suburban areas. Until 1962 the State Board of Education had direct statutory control over site planning for new school construction. During that time, as was pointed out above, the State approved school construction which fostered segregation throughout the Detroit Metropolitan area (See *supra* pp. 34-40). Since 1962 the State Board has continued to be involved in approval of school construction plans.

IV. Conclusion as to Constitutional Violations

The discriminatory practices on the part of the Detroit School Board and the State of Michigan revealed by this record are significant, pervasive and causally related to the substantial amount of segregation found in the Detroit school system by the District Judge.

There is, of course, a significant distinction between this record and those school segregation cases which have flooded the courts since *Brown* v. *Topeka, supra.* This distinction is that Michigan has never enforced segregation by State laws which provided for separate black and white school systems, as was the pattern prior to 1954 in many other States. As a consequence, there always have been some instances of actual school integration in Detroit and still more instances of token school integration.

Defendants seek to insulate themselves from remedial action by federal courts by pointing to the long standing public policy

of Michigan, as expressed in its statutes, of integration of public education. However, this court is not blind to the fact that governments can act only through the conduct of their officials and employees and that unconstitutional actions of individuals can be redressed. *See, e.g., Clemons* v. *Board of Education*, 228 F.2d 853 (6th Cir.), *cert. denied*, 350 U.S. 1006 (1956).

The record in this case amply supports the findings of the District Court of unconstitutional actions by public officials at both the local and State level.

Historically de jure segregation has come about through statutory command explicitly establishing dual school systems. Michigan's declared public policy is urged as a controlling distinction. No matter how important this distinction may be, it does not in our judgment negate the de jure segregation findings entered in this case by the District Judge. The record contains substantial evidence to support the finding of the District Court that the segregation of the Detroit public schools, however rooted in private residential segregation, also was validated and augmented by the Detroit Board of Education and Michigan State Board action of pervasive influence through the system. Even if the segregation practices were a bit more subtle than the compulsory segregation statutes of Southern States, they were nonetheless effective. There should not be one law for the South and a different one for the North.

It is our view that the findings of fact pertaining to actions of the Detroit Board of Education and the State of Michigan which caused or contributed to Detroit school segregation are not clearly erroneous and that the District Court was therefore authorized and required to take effective measures to desegregate the Detroit Public School System. *Brown* v. *Board of Education of Topeka [I]*, 347 U.S. 483 (1954); *Brown* v. *Board of Education of Topeka [II]*, 349 U.S. 294 (1955); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S.

1 (1971); *Davis* v. *Board of Commissioners*, 402 U.S. 33 (1971).

This record contains a substantial volume of testimony concerning local and State action and policies which helped produce residential segregation in Detroit and in the metropolitan area of Detroit. In affirming the District Judge's findings of constitutional violations by the Detroit Board of Education and by the State defendants resulting in segregated schools in Detroit, we have not relied at all upon testimony pertaining to segregated housing except as school construction programs helped cause or maintain such segregation.

V. The District Court's Ruling that no Detroit Only Desegregation Plan is Possible

Subsequent to the entry of its findings of constitutional violations on the part of the Detroit Board of Education and the State of Michigan resulting in system-wide segregation of Detroit public schools, the District Court requested plans for Detroit only desegregation. His findings of fact pertaining to these plans warrant repetition in full:

"FINDINGS OF FACT AND CONCLUSIONS OF LAW
ON
DETROIT-ONLY PLANS OF DESEGREGATION

"In accordance with orders of the court defendant Detroit Board of Education submitted two plans, limited to the corporate limits of the city, for desegregation of the public schools of the City of Detroit, which we will refer to as Plan A and Plan C; plaintiffs submitted a similarly limited plan, which will be referred to as the Foster Plan. Hearings were had on said plans on March 14, 15, 16, 17 and 21, 1972. In considering these plans the court does not limit itself to the proofs offered at the hearing just concluded; it considers as part of the evidence bearing on the issue (*i.e.*, City-Only Plans) all proofs submitted in the case to this point, and it specifically incorporates herein by reference the Findings and Conclusions

contained in its "Ruling on Issue of Segregation," filed September 27, 1971.

"The court makes the following factual findings:

"PLAN A.

"1. The court finds that this plan is an elaboration and extension of the so-called Magnet Plan, previously authorized for implementation as an interim plan pending hearing and determination on the issue of segregation.

"2. As proposed we find, at the high school level, that it offers a greater and wider degree of specialization, but any hope that it would be effective to desegregate the public schools of the City of Detroit at that level is virtually ruled out by the failure of the current model to achieve any appreciable success.

"3. We find, at the Middle School level, that the expanded model would affect, directly, about 24,000 pupils of a total of 140,000 in the grades covered; and its effect would be to set up a school system within the school system, and would intensify the segregation in schools not included in the Middle School program. In this sense, it would increase segregation.

"4. As conceded by its author, Plan A is neither a desegregation nor an integration plan.

"PLAN C.

"1. The court finds that Plan C is a token or part-time desegregation effort.

"2. We find that this plan covers only a portion of the grades and would leave the base schools no less racially identifiable.

"PLAINTIFFS' PLAN

"1. The court finds that Plaintiffs' Plan would accomplish more desegregation than now obtains in the system, or would be achieved under Plan A or Plan C.

"2. We find further that the racial composition of the student body is such that the plan's implementation

would clearly make the entire Detroit public school system racially identifiable as Black.

"3. The plan would require the development of transportation on a vast scale which, according to the evidence, could not be furnished, ready for operation, by the opening of the 1972-73 school year. The plan contemplates the transportation of 82,000 pupils and would require the acquisition of some 900 vehicles, the hiring and training of a great number of drivers, the procurement of space for storage and maintenance, the recruitment of maintenance and the not negligible task of designing a transportation system to service the schools.

"4. The plan would entail an overall recasting of the Detroit school system, when there is little assurance that it would not have to undergo another reorganization if a metropolitan plan is adopted.

"5. It would involve the expenditure of vast sums of money and effort which would be wasted or lost.

"6. The plan does not lend itself as a building block for a metropolitan plan.

"7. The plan would make the Detroit school system more identifiably Black, and leave many of its schools 75 to 90 per cent Black.

"8. It would change a school system which is now Black and White to one that would be perceived as Black, thereby increasing the flight of Whites from the city and the system, thereby increasing the Black student population.

"9. It would subject the students and parents, faculty and administration, to the trauma of reassignments, with little likelihood that such reassignments would continue for any appreciable time.

"In summary, we find that none of the three plans would result in the desegregation of the public schools of the Detroit school district.

"CONCLUSIONS OF LAW

"1. The court has continuing jurisdiction of this action for all purposes, including the granting of effective relief. See Ruling on Issue of Segregation, September 27, 1971.

"2. On the basis of the court's finding of illegal school segregation, the obligation of the school defendants is to adopt and implement an educationally sound, practicable plan of desegregation that promises realistically to achieve now and hereafter the greatest possible degree of actual school desegregation. *Green* v. *County School Board*, 391 U.S. 430; *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19; *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290; *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1.

"3. Detroit Board of Education Plans A and C are legally insufficient because they do not promise to effect significant desegregation. *Green* v. *County School Board*, *supra*, at 439-440.

"4. Plaintiffs' Plan, while it would provide a racial mix more in keeping with the Black-White proportions of the student population than under either of the Board's plans or as the system now stands, would accentuate the racial identifiability of the district as a Black school system, and would not accomplish desegregation.

"5. The conclusion, under the evidence in this case, is inescapable that relief of segregation in the public schools of the City of Detroit cannot be accomplished within the corporate geographical limits of the city. The State, however, cannot escape its constitutional duty to desegregate the public schools of the City of Detroit by pleading local authority. As Judge Merhige pointed out in *Bradley* v. *Richmond*, (slip opinion p. 64):

> 'The power conferred by state law on central and local officials to determine the shape of school attendance units cannot be employed, as it has been here, for the purpose and with the effect of sealing off white conclaves of a racial composition more appealing to the local electorate and obstructing the desegregation of schools. The equal protection clause has required far greater inroads on local government structure than the relief sought here, which is attainable without deviating from state statutory

forms. Compare Reynolds v. Sims, 377 U.S. 533; Gomillion v. Lightfoot, 364 U.S. 339; Serrano v. Priest, 40 U.S.L.W. 2128 (Calif.Sup.Ct. Aug. 30, 1971).

'In any case, if political boundaries amount to insuperable obstacles to desegregation because of structural reason, such obstacles are self-imposed. Political subdivision lines are creations of the state itself, after all.'

"School district lines are simply matters of political convenience and may not be used to deny constitutional rights. If the boundary lines of the school districts of the City of Detroit and the surrounding suburbs were drawn today few would doubt that they could not withstand constitutional challenge. In seeking for solutions to the problem of school segregation, other federal courts have not "treated as immune from intervention the administrative structure of a state's educational system, to the extent that it affects the capacity to desegregate. Geographically or administratively independent units have been compelled to merge or to initiate or continue cooperative operation as a single system for school desegregation purposes."[1]

"That the court must look beyond the limits of the Detroit school district for a solution to the problem of segregation in the Detroit public schools is obvious; that it has the authority, nay more, the duty to (under the circumstances of this case) do so appears plainly anticipated by Brown II,[2] seventeen years ago. While other school cases have not had to deal with our exact situation,[3] the logic of their application of the command of Brown II supports our view of our duty.

"FOOTNOTES

"[1] Bradley v. Richmond, supra [slip opinion p. 68].
"[2] Brown v. Bd. of Ed. of Topeka, 349 U.S. 294, pp. 300-301.
"[3] Haney v. County Board of Education of Sevier County,

410 F.2d 920 (8th Cir. 1969); Bradley v. School Board of the City of Richmond, supra, slip opinion pp. 664-65; Hall v. St. Helena Parish School Board, 197 F.Supp. 649 (E.D. La. 1961), aff'd 287 F.2d 376 (5th Cir. 1961) and 368 U.S. 515 (1962); Lee v. Macon County Bd. of Educ., 448 F.2d 746, 752 (5th Cir. 1971); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Turner v. Littleton-Lake Gaston School Dist., 442 F.2d 584 (4th Cir. 1971); United States v. Texas 447 F.2d 551 (5th Cir. 1971); Lemon v. Bossier Parish School Board, 446 F.2d 911 (5th Cir. 1971)."

The District Judge's finding that no Detroit only plan can achieve desegregation of the Detroit public school system points up another substantial distinction between this case and the classical school segregation case. This record presents a wholly new fact pattern in a school segregation case so far as this Circuit is concerned. *Cf. Bradley v. School Board, City of Richmond*, 338 F.Supp. 67 (E.D. Va. 1971), *rev'd*. 462 F.2d 1058 (4th Cir. 1972), *petition for cert. filed*, 41 U.S.L.W. 3211 (U.S. Oct. 5, 1972); *see Haney v. County Board of Education of Sevier County*, 429 F.2d 364 (8th Cir. 1970). This court never before has been confronted by a finding that any less comprehensive a solution than a metropolitan area plan would result in an all black school system immediately surrounded by practically all white suburban school systems, with an overwhelmingly white majority population in the total metropolitan area.

Relevant to and supportive of the District Judge's findings are these school census figures showing trends toward segregation in the Detroit schools during the last decade:

1960	100 of 251 schools were 90% or more white 71 of 251 schools were 90% or more black 68% of all schools were 90% or more one race
1970	69 of 282 schools were 90% or more white 133 of 282 schools were 90% or more black 71.6% of all schools were 90% or more one race
1960-61	65.8% of the total number of black students in regular schools were in 90% or more black schools

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1970-71 74.9% of the total number of black students in regular schools were in 90% or more black schools.

This record reflects a present and expanding pattern of all black schools in Detroit (resulting in part from State action) separated only by school district boundaries from nearby all white schools. We cannot see how such segregation can be any less harmful to the minority students than if the same result were accomplished within one school district.

The boundaries of the Detroit School district are identical to the geographical boundaries of the City of Detroit. This means that the Detroit school district, like the City, contains within its boundaries two entirely separate cities (and school districts), Hamtramck and Highland Park, and surrounds a third City (and school district), Dearborn, on three sides. Immediately adjacent to the boundaries of the Detroit school district are seventeen school districts. An overwhelming majority of these districts, other than Detroit, Highland Park, River Rouge and Hamtramck, are entirely white or contain only a token number of black students.

Like the District Judge, we see no validity to an argument which asserts that the constitutional right to equality before the law is hemmed in by the boundaries of a school district.

A. Status of School Districts under Michigan Law

This conclusion is supported by the status of school districts under Michigan law and by the historical control exercised over local school districts by the legislature of Michigan and by State agencies and officials, which we now discuss.

It is well established under the Constitution and laws of Michigan that the public school system is a State function and that local school districts are instrumentalities of the State created for administrative convenience.

The Northwest Ordinance of 1787 governing the Territory of Michigan provided:

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> "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Art. III.

With this genesis, Michigan's four Constitutions have clearly established that the public school system in that State is solely a State function. The Constitution of 1835 in Article X, Section 3, provided, in part: "The legislature shall provide for a system of common schools . . ." The Constitution of 1850, Article XIII, Section 4, provided, in part: "The legislature shall . . . provide for and establish a system of primary schools . . ." Section 1 of the same Article provided, ". . . the Superintendent of Public Instruction shall have general supervision of public instruction . . ."

The Constitution of 1908 in Article XI, Section 2, provided that the Superintendent of Public Instruction "shall have general supervision of public instruction in the State." Article XI, Section 9, provided, in part as follows:

> "The legislature shall continue a system of primary schools, whereby every school district in the State shall provide for the education of pupils without charge for tuition . . ."

The Constitution of 1963, the present Constitution of the State of Michigan, in Article VIII, Section 2, provides, in part, as follows:

> "The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law."

In interpereting the above educational provisions of the Constitution of 1850, the Michigan Supreme Court stated, "The school district is a State agency. Moreover, it is of legislative creation . . ." *Attorney General* v. *Lowrey*, 131 Mich. 639, 644, 92 N.W. 289, 290 (1902). Again, interpreting

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the Constitution of 1850, the Supreme Court of Michigan in *Attorney General* v. *Detroit Board of Education*, 154 Mich. 584, 590, 118 N.W. 606, 609 (1908), adopted lower court language which read:

> "Education in Michigan belongs to the State. It is no part of the local self-government inherent in the township or municipality, except so far as the legislature may chose to make it such. The Constitution has turned the whole subject over to the legislature . . ."

The Supreme Court of Michigan interpreted Article XI, Section 9, of the Constitution of 1908 to mean:

> "The legislature has entire control over the schools of the State subject only to the provisions above referred to. The division of the territory of the State into districts, the conduct of the school, the qualifications of teachers, the subjects to be taught therein are all within its control." *Child Welfare* v. *Kennedy School Dist.*, 220 Mich. 290, 296, 189 N.W. 1002, 1004 (1922).

In the leading case concerning construction of this section of the Michigan Constitution of 1963, the Michigan Supreme Court said:

> "It is the responsibility of the State board of education to supervise the system of free public schools set up by the legislature and, as a part of that responsibility, to promulgate regulations specifying the number of hours necessary to constitute a school day for elementary school students as well as for other classifications or groupings of students, to determine the curricula and, in general, to exercise leadership and supervision over the public school system." *Welling* v. *Livonia Board of Education*, 382 Mich. 620, 624, 171 N.W.2d 545, 546 (1969).

Michigan has not treated its school districts as sacrosanct. To the contrary, Michigan always has regarded education as the fundamental business of the State as a whole. Local

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school districts are creatures of the State and act as instrumentalities of the State under State control. *Cf. Senghas* v. *L'Anse Creuse Public Schools*, 368 Mich. 557, 118 N.W.2d 975 (1962); *McLaughlin* v. *Board of Education*, 255 Mich. 667, 239 N.W. 374, (1931).

The record discloses a number of examples of State control over local public education in Michigan.

1. Following the holding of *Welling* v. *Livonia Board of Education*, *supra*, that there was no minimum length of day required under the 180-day school attendance rule absent a State Board of Education regulation, the Michigan State Board of Education, acting under its Constitutional mandate without legislative authority, established an administrative rule requiring local school boards to provide a minimum number of hours per school year. See, *School Districts Child Account for Distribution of State Aid*, Bulletin No. 1005, Michigan State Department of Education (1970).

2. Public Act 289 of 1964 (MSA § 15.2299 (1) *et seq.*, MCLA § 388.681 *et seq.*) required Michigan school districts to operate K-12 systems. When Public Act 289 became effective, 1,438 public school districts existed in Michigan. By the beginning of 1968, this figure had been reduced to 738, meaning that 700 school districts in Michigan have disappeared since 1964 through reorganization. Annual Report, Committee on School District Reorganization, 1968 Journal of the Senate 422-423 (March 1, 1968).

3. Pursuant to Act 289 of 1964, *supra*, the State Board of Education ordered the merger of the Brownstown No. 10, Hand, Maple Grove and Carson school districts, all in Wayne County. The action is best explained by the fact that Brownstown was, at that time, the wealthiest school district in the State, indeed, with a property valuation of $340,000 backing each child, perhaps the wealthiest district in the nation, while the other three districts were extremely poor.

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4. When the Sumpter School District was on the verge of bankruptcy in 1968, the State Board of Education, acting under Public Act 239 of 1967 (MSA § 15.2299(31) *et seq.*, MCLA § 388.691 *et seq.*), merged the district with four adjoining districts, including the Airport School District. Significantly, though Sumpter was in Wayne County, Airport was in Monroe County, showing that county lines are not inviolate in Michigan.

5. The Nankin Mills School District in Wayne County was beset with financial problems and had no high school. Again, pursuant to Act 239, the State Board of Education in 1969 ordered this school district to merge with the Livonia, Garden City and Wayne Community schools.

6. When the Inkster School District in Wayne County was on the verge of financial bankruptcy, the Michigan legislature passed Public Act 32 of 1968 (MSA § 15.1916 *et seq.*, *MCLA* § 388.201 *et seq.*) enabling the district to borrow $705,000 but on the condition that if the district could not balance its budget, the State Board of Education could reorganize, merge or annex the district. The legislative history of Act 32 indicates at least two legislators voted against the bill in the House of Representatives because of the excessive control given to the State Board of Education:

> "I voted No on House Bill No. 3332 because in setting up the machinery to bail out distressed districts, it takes from the local communities the control over their own educational system by providing for excessive arbitrary reorganization powers in the hands of the Board of Education. . ."
>
> "This bill certainly sets up the State Board of Education to be a dictator of all school districts that run into financial problems." 1968 Journal of the House of Representatives 1965.

7. Too small and too poor to operate a high school, the all-black Carver School District in suburban Oakland County

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reached a crisis in 1960 when surrounding white districts refused to accept Carver pupils on a tuition basis. The Governor and Superintendent of Public Instruction helped to merge the Carver district with Oak Park.

8. The State Board of Education and Superintendent of Public Instruction may withhold State aid for failure to operate the minimum school year. MSA § 15.3375, MCLA § 340.575. In 1970, funds were withheld from the City of Grand Rapids School District. 17 Michigan School Board Journal 3 (March, 1970). For Attorney General Opinions holding that State aid may be withheld by the State Board of Education from school districts for hiring uncertified teachers, defaulting on State loans and for other reasons, see Op. Atty. Gen. No. 880, 1949-1950 Report of the Attorney General 104 (January 24, 1949, Roth); No. 2333, 1955 Report of the Attorney General 561 (October 20, 1955, Kavanaugh); No. 4097, 1961-1962 Report of the Attorney General 553 (October 8, 1962, Kelley).

9. The State of Michigan contributes, on the average, 34% of the operating budgets of the 54 school districts included in the Metropolitan Plan of Integration. In eleven of the 54 districts, the State's contribution exceeds 50% and in eight more, it exceeds 40%. State aid is appropriated from the General Fund, revenue raised through state-wide taxation, and is distributed annually to the local school districts under a formula devised by the legislature. See, *e. g.*, Public Act 134 (1971), MSA § 15.1919(51), MCLA § 388.611.

Though the local school districts obtain funds from the assessment of local property, the ultimate authority in insuring equalized property valuations throughout the State is the State Tax Commission. MSA § 7.631, *et seq.*, MCLA § 209.101, *et seq.*; MSA § 7.206, MCLA § 211.148; MSA § 7.52, MCLA § 211.34. The State's duty to equalize is required by the Michigan Constitution, Article IX, Section 3. This "State equalized valuation" serves as the basis for calculating local

revenue yields. See, *Ranking of Michigan Public High School – School Districts by Selected Financial Data, 1970,* Bulletin 1012, Michigan State Department of Education (1971).

10. The Michigan School Code reaffirms the ultimate control of the State over public education. Local school districts must observe all State laws relating to schools,[1] hold school a minimum number of days per year,[2] employ only certified teachers,[3] teach civics, health and physical education and drivers' education,[4] excuse students to attend religious instruction classes,[5] observe State requirements when teaching sex education,[6] make annual financial and other reports to the Superintendent of Public Instruction,[7] adopt only textbooks which are listed with the Superintendent of Public Instruction[8] and must follow all rules and regulations of the State Department of Education.

Local school districts, unless they have the approval of the State Board of Education or the Superintendent of Public Instruction, cannot consolidate with another school district,[9] annex territory,[10] divide or attach parts of other districts,[11] borrow monies in anticipation of State aid,[12] construct, re-

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[1] MSA § 15.3252(c), MCLA § 340.252(c).

[2] MSA § 15.3575, MCLA § 340.575.

[3] MSA §§ 15.1023(10)(a), 15.3570, MCLA §§ 388.1010(a), 340.570.

[4] MSA §§ 15.1951,15.3361, MCLA §§ 388.371, 340.361; MSA §§ 15.3781-15.3782, MCLA §§ 340.781-340.782; MSA § 9.2511(c), MCLA § 257.811(c).

[5] MSA § 15.3732(g), MCLA § 340.732(g).

[6] MSA § 15.3789, MCLA § 340.789.

[7] MSA § 15.3612, MCLA § 340.612; MSA §§ 15.3616, 15.3688, MCLA §§ 340.616, 340.638.

[8] MSA § 15.3887(1), MCLA § 340.887(1).

[9] MSA § 15.3402, MCLA § 340.402.

[10] MSA § 15.3431, MCLA § 340.431.

[11] MSA § 15.3447, MCLA § 340.447.

[12] MSA § 15.3567(1), MCLA § 340.567(a).

construct or remodel school buildings or additions to them,[13] establish a program for the prevention and treatment of behavior problems of children,[14] employ a superintendent without a bachelor's degree from a college acceptable to the State Board of Education,[15] establish facilities and programs for the day care of the physically handicapped or initiate programs for the mentally handicapped.[15]

The power to withhold State aid, of course, effects enormous leverage upon any local school district, since on the average 34 per cent of the operation budget of the 34 school districts included in the Metropolitan Plan is paid for by the State.

In the instance of the City of Detroit, the State exhibited its understanding of its power over the local school district by the adoption of Act 48 of the Public Acts of 1970 which repealed a high school desegregation plan previously adopted by the Detroit Board of Education.

B. De Jure Acts of Desegregation

Thus, the record establishes that the State has committed de jure acts of segregation and that the State controls the instrumentalities whose action is necessary to remedy the harmful effects of the State acts. There can be little doubt that a federal court has both the power and the duty to effect a feasible desegregation plan. Indeed, such is the essence of *Brown II*. *Brown* v. *Board of Education*, 349 U.S. 294, 300-01 (1955). In the instant case the only feasible desegregation plan involves the crossing of the boundary lines between the Detroit School District and adjacent or nearby school districts for the limited purpose of providing an effective

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13 MSA § 15.1961, MCLA § 388.851, Op. Atty. Gen. No. 1837, 1952-1954 Report of the Attorney General 440 (Nov. 8 1954).

14 MSA § 15.3618, MCLA § 340.616.

15 MSA § 15.3573, MCLA § 340.573.

16 MSA § 15.3587(1), MCLA § 340.587(a); MSA § 15.3775, MCLA § 340.775.

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desegregation plan. The power to disregard such artificial barriers is all the more clear where, as here, the State has been guilty of discrimination which had the effect of creating and maintaining racial segregation along school district lines. See Section III B, pp. 41-49, *supra*. *United States* v. *Scotland Neck Board of Education*, 407 U.S. 484, 489 (1972); *Wright* v. *City of Emporia*, 407 U.S. 451, 463 (1972); *United States* v. *State of Texas*, 447 F.2d 441, 443-44 (5th Cir. 1971); *Haney* v. *County Board of Education of Sevier County*, 429 F.2d 364, 368 (8th Cir. 1970). *See also Davis* v. *Board of School Commissioners*, 402 U.S. 33, 36-38 (1971).

There exists, however, an even more compelling basis for the District Court's crossing artificial boundary lines to cure the State's constitutional violations. The instant case calls up haunting memories of the now long overruled and discredited "separate but equal doctrine" of *Plessy* v. *Ferguson*, 163 U.S. 537 (1896). If we hold that school district boundaries are absolute barriers to a Detroit school desegregation plan, we would be opening a way to nullify *Brown* v. *Board of Education* which overruled *Plessy*, *supra*.

This court in considering this record finds it impossible to declare "clearly erroneous" the District Judge's conclusion that any Detroit only desegregation plan will lead directly to a single segregated Detroit school district overwhelmingly black in all of its schools, surrounded by a ring of suburbs and suburban school districts overwhelmingly white in composition in a State in which the racial composition is 87 per cent white and 13 per cent black. Big city school systems for blacks surrounded by suburban school systems for whites cannot represent equal protection of the law.

VI. The District Judge's Order to Prepare A Metropolitan Area Desegregation Plan

The third major issue in this case pertains to the validity of the District Judge's ruling on desegregation area and order for development of a plan of desegregation dated June 14,

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1972, accompanied by a statement of findings of facts and conclusions of law in support thereof.

At the outset it is obvious from what we have said pertaining to the inadequacy of any Detroit only desegregation plan that this court feels that some plan for desegregation beyond the boundaries of the Detroit School District is both within the equity powers of the District Court and essential to a solution of this problem. We reiterate this, keeping in mind the admonition from Chief Justice Marshall:

> "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

We reject the contention that school district lines are sacrosanct and that the jurisdiction of the District Court to grant equitable relief in the present case is limited to the geographical boundaries of Detroit. We reiterate that school districts and school boards are instrumentalities of the State. *See Cooper* v. *Aaron*, 358 U.S. 1, 16 (1958). As early as *Brown II* the Supreme Court pointed out that:

> "[T]he courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, ..." 349 U.S. at 300-01.

The Supreme Court has held that school boundary lines cannot be changed or new school systems created where the result is a larger imbalance in racial ratios in school systems where all vestiges of enforced racial segregation have not been eliminated. *United States* v. *Scotland Neck Board of Edu-*

cation, 407 U.S. 484 (1972); *Wright* v. *Council of the City of Emporia*, 407 U.S. 451 (1972). This is true regardless of "dominant purpose." *Wright* v. *City of Emporia*, 407 U.S. at 462.

If school boundary lines cannot be changed for an unconstitutional purpose, it follows logically that existing boundary lines cannot be frozen for an unconstitutional purpose.

We therefore conclude that the District Court in the present case is not confined to the boundary lines of Detroit in fashioning equitable relief.

To the extent that this opinion is in conflict with *Bradley* v. *School Board of Richmond*, 462 F.2d 1058 (4th Cir. 1972), *petition for cert. filed*, 41 U.S.L.W. 3211 (U.S. Oct. 5, 1972), we respectfully decline to follow that decision.

VII. Rights of Other School Districts To Be Made Parties and To Be Heard

In his "Ruling on Propriety of Considering a Metropolitan Remedy" the District Court defined the metropolitan area "for the present purposes" to comprise the three counties of Wayne, Oakland and Macomb. In his "Findings of Fact and Conclusions of Law in Support of Ruling on Desegregation Area and Development Plans" the District Court noted that 'the court has taken no proofs with respect to the establishment of the boundaries in the counties of Wayne, Oakland and Macomb." In his "Ruling on Desegregation Area and Order for Development of Plan of Segregation" the District Court defined the desegregation area to include some 53 school districts. Certain of these school districts have intervened in this case, but have not yet been afforded an opportunity to offer proof. Some of the other school districts are not parties to the litigation.

Under the authorities heretofore discussed, these school districts are arms and instrumentalities of the State of Michigan. Nevertheless, under Michigan law, they may sue and be sued. *See* 11 M.S.A. §§ 15.3154, 15.3192.

Rule 19, Fed. R. Civ. P. provides that a person who is subject to service of process shall be joined as a party to the action if "in his absence complete relief cannot be accorded among those already parties." Under this rule joinder of necessary parties is required if jurisdiction over them can be obtained and if joinder will not defeat federal jurisdiction of the case. *See Bradley* v. *School Board of City of Richmond*, 51 F.R.D. 139 (E.D. Va. 1970).

We hold that school districts which are to be affected by the decree of the District Court are "necessary parties" under Rule 19. As a prerequisite to the implementation of a plan in this case affecting any school district, the affected district first must be made a party to this litigation and afforded an opportunity to be heard.

While agreeing with the District Court in its conclusion that it can consider a metropolitan remedy, we express no views as to the desegregation area set forth in the orders of the District Court.

We vacate the order of March 28, 1972, entitled "Ruling on Propriety of a Metropolitan Remedy to Accomplish Desegregation of the Public Schools of Detroit." For the guidance of the District Court on remand, however, we hold that, in fashioning an equitable remedy in this case, it will not be necessary for the District Court to find discriminatory conduct on the part of each school district, either de jure or de facto, as a prerequisite to including such district in a desegregation area to be defined by the court's decree.

As said in *United States* v. *Texas Education Agency*, ——— F.2d —— (5th Cir. 1972):

> "Some schools may be the 'result' of state-imposed segregation even though no specific discriminatory school board action may be shown as to those schools. Had the school authorities not specifically segregated the minority students in certain schools, other schools may have developed as desegregated facilities. Thus, though they may not be 'pockets of discrimination,' these schools are

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the 'results' of discrimination." *United States* v. *Texas Education Agency, supra,* ——— F.2d at ———.

We also vacate the District Court's Ruling on Desegregation Area and Development Plan, dated June 14, 1972, except those parts of the order appointing a panel charged with the duty of preparing interim and final plans of desegregation. The panel appointed by the District Court is authorized to proceed with its studies and planning under the direction of the District Court. Pending further orders of the District Court or this Court, the defendants and school districts involved will continue to supply administrative and staff assistance to the panel upon its request. Until further order of the court, the reasonable costs incurred by the panel will be paid as provided by the District Court's order of June 14, 1972.

The order of the District Court directing the purchase of school buses, dated July 11, 1972, also is vacated, subject to the right of the District Court, in its discretion, to consider the entry of another order requiring the purchase of school buses at the appropriate time.

VIII. Equitable Relief

In this opinion we have emphasized the broad powers of a District Court to fashion equitable relief in school desegregation cases. For the guidance of the District Court on remand, we now review the decisions on this subject in further depth.

1) The Fundamental Constitutional Holding:

> "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." *Brown* v. *Board of Education,* 347 U.S. 483, 495 (1954).

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2) The Supreme Court's Initial Description of the Equitable Remedy:

> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies[4] and by a facility for adjusting and reconciling public and private needs.[5] These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.
>
> "While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regula-

[4] See *Alexander* v. *Hillman*, 296 U.S. 222, 239.

[5] See *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330.

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tions which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases." *Brown* v. *Board of Education of Topeka [II]*, 349 U.S. 294, 300-01 (1955)

3) Delay Is No Longer Tolerable:

"In determining whether respondent School Board met that command by adopting its 'freedom-of-choice' plan, it is relevant that this first step did not come until some 11 years after *Brown I* was decided and 10 years after *Brown II* directed the making of a 'prompt and reasonable start.' This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system. Such delays are no longer tolerable, for 'the governing constitutional principles no longer bear the imprint of newly enunciated doctrine.' *Watson* v. *City of Memphis, supra,* at 529; see *Bradley* v. *School Board, supra; Rogers* v. *Paul,* 382 U.S. 198. Moreover, *a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable.* 'The time for mere 'deliberate speed' has run out,' *Griffin* v. *County School Board,* 377 U.S. 218, 234; 'the context in which we must interpret and apply this language [of *Brown II*] to plans for desegregation has been significantly altered.' *Goss* v. *Board of Education,* 373 U.S. 683, 689. See *Calhoun* v. *Latimer,* 377 U.S. 263. *The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now.*" *Green* v. *County School Board,* 391 U.S. 430, 438-39 (1968) (Emphasis added.)

4) State Imposed Segregation Must be Completely Removed at Earliest Practicable Date:

"The obligation of the district courts, as it always has

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been, is to assess the effectiveness of a proposed plan in achieving desegregation. *There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance.* It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness. *Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system 'at the earliest practicable date,' then the plan may be said to provide effective relief.* Of course, the availability to the board of other more promising courses of action may indicate a lack of good faith; and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method. Moreover, whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed. See No. 805, *Raney* v. *Board of Education, post,* at 449." *Green* v. *County School Board,* 391 U.S. 430, 439 (1968) (Emphasis added.)

5) The Court Has The Power and The Duty to Eliminate Effects of Past Discrimination:

"We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Louisiana v. *United States,* 380 U. S. 145, 154. Compare the remedies discussed in, *e. g., NLRB* v. *Newport News Shipbuilding & Dry Dock Co.,* 308 U. S. 241; *United States* v. *Crescent Amusement Co.,* 323 U. S. 173; *Stand-*

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ard Oil Co. v. *United States*, 221 U. S. 1. See also *Griffin* v. *County School Board*, 377 U. S. 218, 232-234. *Green* v. *County School Board*, 391 U.S. 430, n. 4 at 438 (relating to the remedial command of Brown II) (Emphasis added.)

6) Resegregation is Impermissible:

"Like the transfer provisions held invalid in *Goss* v. *Board of Education*, 373 U.S. 683, 686, '[i]t is readily apparent that the transfer [provision] lends itself to perpetuation of segregation.' While we there indicated that 'free-transfer' plans under some circumstances might be valid, we explicitly stated that '*no* official transfer plan or *provision of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment.*' *Id.*, at 689. So it is here; no attempt has been made to justify the transfer provision as a device designed to meet 'legitimate local problems,' *ibid.*; rather it patently operates as a device to allow *resegregation* of the races to the extent desegregation would be achieved by geographically drawn zones. Respondent's argument in this Court reveals its purpose. We are frankly told in the Brief that without the transfer option it is apprehended that white students will flee the school system altogether. 'But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.' *Brown II*, at 300.

"We do not hold that 'free transfer' can have no place in a desegregation plan. But like 'freedom of choice,' if it cannot be shown that such a plan will further rather than delay conversion to a unitary, nonracial, nondiscriminatory school system, it must be held unacceptable. See *Green* v. *County School Board*, *supra*, at 439-441.

"*We conclude, therefore, that the Board 'must be required to formulate a new plan and, in light of other courses which appear open to the Board. . . . fashion*

steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." Id., at 442. *Monroe* v. *Board of Commissioners*, 391 U.S. 450, 459-60 (1968) (Emphasis added.)

7) The Remedial Tools:

In *Swann* v. *Board of Education*, 402 U.S. 1, 15, Chief Justice Burger, writing for a unanimous Court, said:

> "If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.
>
> > 'The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.' *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944), cited in *Brown II*, *supra*, at 300."

a) The Flexible Ratio:

"As the voluminous record in this case shows, the predicate for the District Court's use of the 71%-29% ratio was twofold: first, its express finding, approved by the Court of Appeals and not challenged here, that a dual school system had been maintained by the school authorities at least until 1969; second, its finding, also approved by the Court of Appeals, that the school board had totally defaulted in its acknowledged duty to come forward with an acceptable plan of its own, notwithstanding the patient efforts of the District Judge who, on

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at least three occasions, urged the board to submit plans. As the statement of facts shows, these findings are abundantly supported by the record. It was because of this total failure of the school board that the District Court was obliged to turn to other qualified sources, and Dr. Finger was designated to assist the District Court to do what the board should have done.

"We see therefore that the use made of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement. From that starting point the District Court proceeded to frame a decree that was within its discretionary powers, as an equitable remedy for the particular circumstances. As we said in *Green*, a school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness. Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court." *Swann* v. *Board of Education*, 402 U.S. 1, 24-25 (1970).

b) Noncontiguous School Zoning:

"The maps submitted in these cases graphically demonstrate that one of the principal tools employed by school planners and by courts to break up the dual school system has been a frank — and sometimes drastic — gerrymandering of school districts and attendance zones. An additional step was pairing, 'clustering,' or 'grouping' of schools with attendance assignments made deliberately to accomplish the transfer of Negro students out of formerly segregated Negro schools and transfer of white students to formerly all-Negro schools. More often than not, these zones are neither compact nor contiguous; indeed they may be on opposite ends of the city. As an interim corrective measure, this cannot be said to be beyond the broad remedial powers of a court.

"Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.

"No fixed or even substantially fixed guidelines can be established as to how far a court can go, but it must be recognized that there are limits. The objective is to dismantle the dual school system. 'Racially neutral' assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a 'loaded game board,' affirmative action in the form of remedial altering of attendance zones is proper to achieve truly non-discriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral.

"In this area, we must of necessity rely to a large extent, as this Court has for more than 16 years, on the informed judgment of the district courts in the first instance and on courts of appeals.

"*We hold that the pairing and grouping of noncontiguous school zones is a permissible tool and such action is to be considered in light of the objectives sought.* Judicial steps in shaping such zones going beyond combinations of contiguous areas should be examined in light of what is said in subdivisions (1), (2), and (3) of this opinion

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concerning the objectives to be sought. Maps do not tell the whole story since noncontiguous school zones may be more accessible to each other in terms of the critical travel time, because of traffic patterns and good highways, than schools geographically closer together. Conditions in different localities will vary so widely that no rigid rules can be laid down to govern all situations." *Swann* v. *Board of Education*, *supra*, at 27-29. (Emphasis added.)

c) Transportation of Students:

"The scope of permissible transportation of students as an implement of a remedial decree has never been defined by this Court and by the very nature of the problem it cannot be defined with precision. No rigid guidelines as to student transportation can be given for application to the infinite variety of problems presented in thousands of situations. *Bus transportation has been an integral part of the public education system for years, and was perhaps the single most important factor in the transition from the one-room schoolhouse to the consolidated school. Eighteen million of the Nation's public school children, approximately 39%, were transported to their schools by bus in 1969-1970 in all parts of the country.*

"The importance of bus transportation as a normal and accepted tool of educational policy is readily discernible in this and the companion case, *Davis*, *supra*. The Charlotte school authorities did not purport to assign students on the basis of geographically drawn zones until 1965 and then they allowed almost unlimited transfer privileges. *The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system is supported by the record.*

"*Thus the remedial techniques used in the District Court's order were within that court's power to pro-*

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vide equitable relief; implementation of the decree is well within the capacity of the school authority.

"The decree provided that the buses used to implement the plan would operate on direct routes. Students would be picked up at schools near their homes and transported to the schools they were to attend. The trips for elementary school pupils average about seven miles and the District Court found that they would take "not over 35 minutes at the most." This system compares favorably with the transportation plan previously operated in Charlotte under which each day 23,600 students on all grade levels were transported an average of 15 miles one way for an average trip requiring over an hour. In these circumstances, we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to the walk-in school.

"*An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process.* District courts must weigh the soundness of any transportation plan in light of what is said in subdivisions (1), (2), and (3) above. It hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students. The reconciliation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have traditionally employed." *Swann* v. *Board of Education, supra*, at 29-31. (Emphasis added.)

In *North Carolina* v. *Swann*, 402 U.S. 43, 46, the Chief Justice said: "As noted in *Swann, supra*, at 29, bus transportation has long been an integral part of all educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance on it."

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d) Equity Power to Require Payment of Tax Funds for Integrated Schools:

In the exercise of its equity powers, a District Court may order that public funds be expended, particularly when such an expenditure is necessary to meet the minimum requirements mandated by the Constitution. *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218, 233 (1964); *Eaton* v. *New Hanover County Board of Education*, 459 F.2d 684 (4th Cir. 1972); *Brewer* v. *School Board of City of Norfolk*, 456 F.2d 943, 947, 948 (4th Cir.), *cert. denied*, 406 U.S. 933 (1972); *Plaquemines Parish School Board* v. *United States*, 415 F.2d 817 (5th Cir. 1969).

These and other cases cited in this opinion outline the broad scope of equitable relief that may be fashioned by the District Court in this case on remand after all school districts to be affected are afforded an opportunity to be heard as hereinabove provided.

IX. Other Issues

Numerous other issues are presented which do not require discussion.

We do not consider it necessary to construe the "Broomfield Amendment," Pub. L. No. 92-318, 86 Stat. 235, § 803, known as the Education Amendments of 1972, since no final desegregation order has been entered.

Deal v. *Cincinnati Board of Education*, 419 F.2d 1387, 1392 (6th Cir. 1969), *cert. denied*, 402 U.S. 962 (1971) is not controlling. There the District Court made findings of fact that there had been no unconstitutional conduct on the part of the Cincinnati Board of Education. This court held that these findings of fact were not clearly erroneous. Rule 52(a), Fed. R. Civ. P.

All other contentions presented by the appellants have been considered and are found to be without merit.

X. Conclusion

1. The Ruling of the District Court on the Issue of Segregation, dated September 27, 1971, and reported at 338 F.Supp. 582, is affirmed.

2. The findings of fact and conclusions of law on "Detroit-only" plans of desegregation, dated March 28, 1972, are affirmed.

3. The Ruling on Propriety of a Metropolitan Remedy to Accomplish Desegregation of the Public Schools of the City of Detroit, dated March 24, 1972, is affirmed in part, but vacated for the reasons set forth above.

4. The Ruling on Desegregation Area and Development of Plan, dated June 14, 1972, is vacated except as hereinabove prescribed.

5. The order dated July 11, 1972, directing the purchase of school buses is vacated.

The case is remanded to the District Court for further proceedings not inconsistent with this opinion.

No costs are taxed. Each party will bear his own costs.

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